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Supreme Court, U.S.
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IN THE

Supreme Court of the United States

FRED RIGGS, DONNA SINGER, and AL DICKSON,

Petitioners,

v.

SAN JUAN COUNTY, SAN JUAN HEALTH DISTRICT, County Commissioner J. TYRON LEWIS, County Commissioner LYN STEVENS (official capacity only), COMMISSIONER MANUAL MORGAN (official capacity only), RICK BAILEY, County Attorney CRAIG HALLS, REID WOOD, KAREN ADAMS, ROGER ATCITTY, PATSY SHUMWAY (official capacity only), JOHN LEWIS, LAUREN SCHAFER, TRUCK/FARMER'S INSURANCE AND ATTORNEY DENNIS ICKES, and as yet unnamed JOHN AND JANE DOES, in their official and individual capacities, jointly and severally,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Did the Tenth Circuit Court of Appeals, in remanding the case to Federal District Court, and in ruling that the Federal District court had no jurisdiction to enforce a judgment of the Navajo Tribal Court as against the defendants: (1) violate previous case precedence of this Court; (2) directly conflict within itself and other Circuit Courts; (3) act outside its own subject matter jurisdiction, by defining Tribal Court subject matter jurisdiction by immunizing non-Indians from Tribal government authority contrary to Treaties, statutes, Executive orders, regulations, policies and contracts?

PARTIES TO THE PROCEEDINGS

Petitioners are Navajo Court plaintiffs Fred Riggs, Donna Singer, Al Dickson. Respondents are San Juan County, San Juan Health District, County Commissioner J. Tyron Lewis, County Commissioner Lyn Stevens (official capacity only), Commissioner Manual Morgan (official capacity only)[1], Rick Bailey, County Attorney Craig Halls, Reid Wood, Karen Adams, Roger Atcitty, Patsy Shumway (official capacity only), John Lewis, Lauren Schafer, Truck/Farmer's Insurance and Attorney Dennis Ickes, and as yet unnamed John and Jane Does, in their official and individual capacities, jointly and severally.

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1. Under Rule 25(d), County Commissioners Lyn Stevens and Manual Morgan are automatically substituted due to an election.

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Petitioners Fred Riggs, Donna Singer, and Al Dickson respectfully petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Tenth Circuit in this case.

OPINIONS BELOW

The opinion of the United States Court of Appeals Tenth Circuit (P. App. 2a) is docket no. 01-4001 entered on October 7, 2002. The opinions of the United States Utah District court dismissing the respondents from the Navajo Court action on October 30, 2000 (P. App. 26a) and December 13, 2000 (P. App. 52a) is docket no. 2:00 CV 0584. The Navajo Nation Preliminary Injunction Order of December 28, 1999 (P. App. 70a) and Order Denying the Defendants' Motion to Modify the Preliminary Injunction Order, of March 1, 2000, (P. L-1) ("Petitioners Lodging") (supporting Orders of the Navajo Nation District Court, Judicial District of Shiprock, (P. L-17-20,) are docket no. SR-CV-162-99-CV.

STATEMENT OF JURISDICTION

The judgment of the Tenth Circuit Court of Appeals was entered on October 7, 2002. (P. App. 2a). A petition for rehearing was denied on November 8, 2002 (P. App. 105a). The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

TREATY PROVISIONS INVOLVED

The Treaty of 1868, *see* 15 Stat. 667, the **United Nations International Covenant on Civil and Political Rights**, (UNCPCR) Part I, Article 1, Sec. 3; Part III, Art. 14, Sec. 1. The law was signed by Pres. Jimmy Carter in 1977 and adopted by the U.S. Senate by 2/3 vote on April 2, 1992,

deposited by Pres. George Bush on June 8, 1992, becoming effective on Sept. 8, 1992.[2]

CONSTITUTIONAL PROVISIONS

Article I, Section 8, the Indian Commerce Clause. Article VI the Supremacy Clause

EXECUTIVE ORDERS AND PROCLAMATIONS INVOLVED

Executive Order 13175 signed by President Clinton on November 6, 2000, and

President Bush's Proclamation of November 12, 2001, supporting this Executive Order states,

> My Administration will continue to work with tribal governments on a sovereign to sovereign basis. . . . We will *protect and honor tribal sovereignty* and help to stimulate economic development in reservation communities.

(P. L-138, 139).

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2. Hearing before the Senate Committee on Foreign Relations, 102d Cong., 1st Sess., Nov. 21, 1991, S. Hrg. 102-478; Report of the Senate Foreign Relations Committee, Exec. Rept. 102- 23, March 24, 1992; 102 Cong. Rec. S4781-4784 (daily ed. April 2, 1992).

STATUTORY PROVISIONS INVOLVED

The Indian Civil Rights Act, 25 U.S.C. §§ 1301-1303.

25 U.S.C. § 1301(2) defines 'self-government' as

> (2) "powers of self-government" means and includes *all* governmental powers possessed by an Indian tribe, executive, legislative, and *judicial*, and all offices, bodies, *and tribunals* by and through which they are executed, including courts of Indian offenses; and means the *inherent power of Indian tribes*, hereby *recognized and affirmed*, to exercise criminal jurisdiction over all Indians;

25 U.S.C. § 1302(8) provides that

> No Tribe in exercising *powers of self-government* shall; . . . .
>
> (8) deny to any *person* within its jurisdiction the equal protection of its laws or deprive *any person* of liberty or property without due process of law.

25 U.S.C. § 450, *et seq*. the Indian Self-Determination Act. 25 U.S.C. § 450 makes formal Congressional findings as follows:

> (1) the prolonged *Federal domination* of Indian service programs *has served to retard* rather than enhance the progress of Indian people and their communities by *depriving Indians of the full opportunity to develop leadership skills crucial*

> *to the realization of self-government*, and has denied to the Indian people an effective voice in the planning and implementation of programs for the benefit of Indians which are responsive to the true needs of Indian communities; and
>
> (2) the *Indian people will never surrender their desire to control their relationships* both among themselves and *with non-Indian governments, organizations, and persons*.

Emphasis Added.

25 U.S.C. § 450(a) declaring Congressional policy, states,

> (c) Declaration of national goal 'The Congress declares that a major national goal of the United States is to . . . to achieve the measure *of self-determination essential* to their social and economic well-being.

Emphasis Added.

25 U.S.C. § 450(e) provides for Indian Preference in Employment.

25 U.S.C. §§ 3601, 3602 The Indian Tribal Justice Act passed in 1993. 25 U.S.C. § 3601 is Congress' commitment to Tribal Courts and recognition of them as a vital part of Tribal governance:

> The Congress finds and declares that —
>
> (2) the United States has a trust responsibility to each tribal government that *includes the **protection** of the sovereignty of each tribal government*;

(3) Congress, through *statutes, treaties, and the exercise of administrative authorities*, has *recognized the self-determination, self-reliance, and inherent sovereignty of Indian tribes*;

(4) Indian tribes possess ***the inherent authority*** to establish their own form of government, *including tribal justice systems*;

(5) tribal justice systems are an *essential part of tribal governments and serve as important forums for ensuring public health and safety and the political integrity of tribal governments*;

(6) Congress and the Federal courts have repeatedly recognized tribal justice systems as the appropriate forums for the adjudication of disputes affecting personal and property rights;

(7) traditional *tribal justice practices* are essential to the *maintenance of the culture and identity of Indian tribes* and to the goals of this chapter;

(8) tribal justice systems are inadequately funded, and the lack of adequate funding impairs their operation; and

(9) tribal government involvement in and commitment to improving tribal justice systems is essential to the accomplishment of the goals of this chapter.

Emphasis added.

25 U.S.C. §§ 3651, *et seq.* 'Indian Tribal Justice Technical and Legal Assistance Act of 2000' reiterates many of the findings above, but adds,

> (2) Indian tribes are sovereign entities and *are responsible for exercising governmental authority over Indian lands*; . . .
>
> (6) Congress and the Federal courts have repeatedly recognized tribal justice systems as the *most* appropriate forums for the adjudication of disputes affecting personal and property rights on Native lands; . . .
>
> (11) the provision of adequate technical assistance to tribal courts and legal assistance to both individuals and tribal courts is an essential element in *the development of strong tribal court systems*.

Emphasis added.

25 U.S.C. § 3665. Tribal authority

> Nothing in this chapter shall be construed to —
>
> (1) encroach upon or diminish *in any way* the *inherent sovereign* authority of each tribal government to determine *the role of the tribal justice system within the tribal government or to enact and enforce tribal laws*;
>
> (2) diminish in any way the authority of tribal governments to appoint personnel;

(3) impair the *rights* of each tribal government to determine the *nature of its own legal system* or the appointment of authority within the tribal government;

(4) *alter in any way any* tribal traditional dispute resolution fora;

(5) imply that any tribal justice system is an instrumentality of the United States; or

(6) diminish the *trust responsibility* of the United States to Indian tribal governments *and tribal justice systems* of such governments.

Emphasis Added.

25 U.S.C. §§ 3631 and 3665, among *many* other statutes and policies, states that these laws shall not diminish Tribal inherent sovereignty in their Courts or governments.

Contracts

Self-Determination Act Navajo Judicial Program — Annual Funding Agreement Between the Navajo Nation and the United States of America, Secretary of the Department of Interior, Page 1 and 2. (P. L-144-146) obligating the Navajo Nation Judicial Program to carry out its duties in "conformity with . . . *the Navajo Nation law and the Indian Civil Rights Act*." (P. L-145).

STATEMENT OF THE CASE

This case is about the Tenth Circuit Court's dismissal of Truck/Farmer's Insurance and Attorney Ickes: (1) conflicting with the standards set by this Court in *Montana v. United States*, 450 U.S. 544, 565 (1981) for exceptions of Tribal Court jurisdiction over non-Indians; (2) directly conflicting with and exactly opposite to the unanimous en banc decision in *United States v. Enas*, 255 F.3d 662 (9th Cir. 2001) (*en banc*), *cert denied*, 122 S. Ct. 925 (2002) regarding the application of the Indian Civil Rights Act, and Supreme Court precedence prior to *Oliphant v. Suquamish Indian Tribe*, 435 U.S. 191 (1978); and (3) conflicting with Treaties, statutes, Executive Orders, regulations and policies that are in keeping with *Enas* reasoning, by *de facto* immunizing all non-Indians from Tribal governance.

No U.S. Statute has established a fiduciary duty to non-Indians, or states, but has recognized this high standard of trust under Treaties. 25 U.S.C § 3601(2), among others. Certiorari should be granted based upon issues of immunity, conflicts with Supreme Court and other Circuit Court precedence, and the issue is one of grave national importance to about 500 Indian Tribes in the United States in determining the scope of their ability to enact and enforce their laws. (*See* N.N. 7 § 253 Jurisdiction: "All civil actions in which the defendant is a resident of Navajo Indian Country, or has caused an action to occur within the territorial jurisdiction of the Navajo Nation." (P. L-61 and 60-66).

Simply stated this case is about Plaintiff Navajo members, Riggs and Dickson, and a Navajo spouse and mother of Navajo children, Plaintiff Singer, covered by the *Navajo Preference in Employment Act* (P. App. 98a & L-37, 22-31, 25-26) seeking protection of *Navajo* Court, for *Navajo*

law violations , irreparably injuring them, and other Native Americans, while within the *Navajo Nation's* exterior borders, at Montezuma Creek Clinic operated by the Defendants on land held in trust for the *Utah Navajo* people by the Utah Navajo Trust Fund, by federal statute mandates.[3] The bad faith litigation, noted by the Navajo Court (Pet. App. 97-98a) involving Truck and Attorney Ickes, (P. L-21) often occurred in the Navajo Court's presence on Tribal trust land at Shiprock, New Mexico, within the exterior borders of the Navajo Nation.

The subject matter jurisdiction of the Navajo Court was briefed more than once in Tribal Court, once based upon the Navajo Preference in Employment Act. (P. L-37). The Tribal Court Issued an Injunction Order and dismissed the motion for reconsideration and the Plaintiffs ignored the Court. The Court issued orders in support of the Preliminary Injunction. (P. L- 17, 18-20). The Navajo Court aware of the damages to patients in the area threatened a fine of "$10,000 dollars a day," and "$1000 per day personally" for each day the Orders of the Court were not carried out. (P. L-16).[4]

---

3. Act of June 14, 1934, ch. 521, 48 Stat. 960-962. *Pelt v. Utah*, 104 F.3d 1534, 1540 (10th Cir. 1996).

4. The Navajo Court noted:

> The Court, despite previous denials, now attempt to justify their placing the Native American Patients in danger in a cloud of 'confusion' on the 14th day of May, 1999. The prior Temporary Restraining order directed the defendants not to interfere with the Clinic operations. This effort of the Defendants at this juncture lacks sincerity. The defendants' motion to dissolve the preliminary injunction lacked even so much as an

(Cont'd)

The Navajo Court found

> the defendants had engaged in a pattern of bad faith conduct toward the court, had wasted judicial resources, had engaged in 'repeated misrepresentations of fact and law,' had engaged in evidence spoliation, had intimidated and tampered with witnesses, had obstructed testimony, and had engaged in the sandbagging of evidence. (*Id.* at 80.) In the Navajo court's view, the defendants had made frivolous claims against Navajo plaintiffs and subjected them 'to a trial by tabloid.'

(P. App. 97a). Then linked the harm to the political integrity of the Navajo Natior and its ability to protect people. (*Id.*)

(Cont'd)

> apology for the harm they have done over the last nine months of billing indigent Native American patients discouraging their attendance to both emergency and routine health care. The motion of the defendants lacks even the smallest appreciation for their blatant violations of civil rights of the plaintiffs that has torn a family apart, and grossly harmed the plaintiffs, and innocent patients' and families relying on the clinic for health care. Likewise such cold and insensitive and recalcitrant attitudes on the part of the defendants further goes to illustrate the defendants bad faith to these proceedings and presents a foundation from which so much prejudice can grow from like a scavenging parasite of people ignorant of the harm of their malignant acts, and who lack any remorse for their harm to the plaintiffs, patients and this court.

(P. L-11).

> If minimal research had been done by the defense, and the truth had been told, and which Navajo Nation case law depended upon, the TRO could have been simply replaced by the Preliminary Injunction on May 14, 1999 with no further deprivations of the plaintiffs . . . numerous diabetic patients would not have continued to go without treatment for a life threatening disease.

(P. App. 95a).

"The defendants can not complain of damage due to large sums of back pay if the defendants could have cut the time short by telling the truth. . . ." (P. App. 92a). Injuries to the patients would escalate if the injunction did not issue. (P. App. 90a). Health and Employment are vital concerns of the Navajo government (P. L-22, *et seq.*) A significant step the Tenth Circuit avoided despite noting the Navajo Court noting a sharp (250%) drop in diabetic patient visits (P. App. 4a-5a) and other direct endangerment of Native American patients.

REASONS FOR GRANTING THE PETITION

I. The Tenth Circuit Court Defendant Dismissals Conflict with *Montana* and de facto immunizes Navajo Law violators based upon national origin

Montana at 565, states, First, "[a] tribe may regulate, through taxation, licensing, or *other means*, the activities of nonmembers who enter consensual relationships with the tribe or its members, through commercial dealing, *contracts*, leases, or other arrangements." *Montana*, supra. Second, "[a] tribe may also retain inherent power to exercise civil authority over the conduct of non-Indians on fee lands within

its reservation when that conduct threatens or has some direct effect on the political integrity, the economic security, or the health or welfare of the tribe." *Id.* at 566. The Tenth Circuit Court relied upon this presumption against Tribal Court jurisdiction to dismiss the defendants. (P. App. 22a). This presumption is opposite Congress' presumption of Tribal Court jurisdiction found **25 U.S.C. §§ 3651**, *et seq*. "Indian Tribal Justice Technical and Legal Assistance Act of 2000" (2) and (6) and case law prior to the *Oliphant* "inherent divestiture" theory, and Navajo code (P. L-61, 64). The Tenth Circuit found no due process problems and relied upon no facts supporting any such claims.

Citing to an undefined, ambiguous, and arbitrary 'nexus' problem first declared in *Atkinson Trading Post v. Shirley*, 121 S. Ct. 1825 (2001) the Tenth circuit court found that Truck's insurance contract with the San Juan Health Services district, [allowing Truck to voluntarily profit itself from each Navajo patients health care contract (of which Truck' policy was an inherent part)] at Montezuma Creek clinic, and Attorney Ickes' contract with the Navajo Nation bar association, [was an inherent aspect of his authority to voluntarily profit himself within the Navajo Nation by defending the respondents in Navajo Court in Shiprock] were 'too attenuated' to survive *Montana* scrutiny. (P. App. 14a).

As to the second, political integrity, public safety, health and welfare exception, the Federal District and Appellate Courts noting the bad faith litigation, abused their discretion and the U.S. fiduciary duty toward Indians as a whole, by failing to take the additional step, as did the Navajo Court, and Petitioners in their briefs below, of linking these acts with the harm (P. App. 97a- 98a) directly to the Navajo Nation plaintiffs, patients, and the government itself, under the *Montana* second exception.

The Tenth Circuit astutely noted, "By enrolling as a member of the Navajo Nation Bar Association, Ickes agreed to follow the American Bar Association's Model Rules of Professional Conduct, which have been adopted by the Navajo Nation Supreme Court. Rule 8.5(a) of the Model Rules provides, 'A lawyer admitted to practice in this jurisdiction *is subject to the disciplinary authority of this jurisdiction*. . . .'" (P. App. 15a). The Tenth Circuit then takes the unprecedented leap of defining "*this* jurisdiction" as New Mexico state and arbitrarily applies New Mexico interpretations of its state bar standards to the Navajo Nation Courts. (*Id.*) If anything, undisputably, Attorney Ickes is licensed in Utah. The Tenth Circuit replaces New Mexico's cultural ideals of fairness in this judgment for the Navajo Court's judgment. "In ***our judgment***, the power to discipline an attorney for alleged misconduct in court is distinct from the power to join the attorney as a defendant with the clients he is representing before that court." (*Id.*) The Court's rulings conflicted with previous rulings wherein parties in federal courts at times were paid by opposing counsel within the Federal Courts' contempt authority.[5]

Allowing the Navajo Bar to sanction the Attorney is *contra* the restorative justice principles of Navajo culture, and is no remedy as the Navajo Court, bound by this 'nexus'

5. *See Murphy v. Housing Authority and Urban Redevelopment Agency of the City of Atlantic City, et al.* (U.S. Dist. Crt. N.J.) 158 F. Supp. 2d 438; 2001 U.S. Dist. LEXIS 12918; 50 Fed. R. Serv. 3d (Callaghan) 1602 August 27, 2001; *Casillan v. Regional Transp. Dist.*, 1993 U.S. App. LEXIS 32668, Nos. 92-1009, 92-1039, 1993 WL 8732, at ** 6-7 (10th Cir. Jan. 15, 1993); *DeHerra v. City and County of Denver ex rel. Brd. of Water Comm'rs*, No. 95-110, WL 521053 (10th Cir. June 12, 1996); *Schutts v. Bently Nevada Corporation, et al.* (U.S. Dist. Crt. Nev.) 966 F. Supp. 1549, 1997; 1997 U.S. Dist. LEXIS 8459.

standard, could not enforce any Navajo order against him because he is white and not Indian, a condition of national origin. Based upon the foregoing, the Tenth Circuit dismissal of Truck and Attorney Ickes violated the first and second *Montana* exceptions, and codified express Congressional authority, and should be reversed.

II. The Tenth Circuit Court's Ruling as to the Applicability of the Indian Civil Rights Act to Tribal Court Jurisdiction Conflicts with and is Exactly Opposite of the Ninth Circuit unanimous en banc decision in *Enas*, and prior Supreme Court Precedence

If this Court adopts *Enas*' reasoning, *Montana*'s infamous test will be obsolete as Courts will have no subject matter jurisdiction to narrow the scope of Tribal Courts' jurisdiction. *United States v. Enas*, 255 F.3d 662 (9th Cir. 2001) (*en banc*), *cert denied*, 122 S. Ct. 925, 2002, the Ninth Circuit *en banc* held "We conclude that under the 1990 amendments to the Indian Civil Rights Act, Indian tribes prosecute non-member Indians pursuant to their inherent power." *Id*. The Court explained that Tribal Courts' exercise of inherent sovereignty is not a "Constitutional" issue wherein the *Courts* have the ability to restrict a Tribes inherent sovereign authority, but one of federal common law wherein "*Congress [not the Courts] has the power to expand and contract the inherent sovereignty that Indian tribes possess because it has legislative authority over federal common law.*" *Enas*, at 669-71 . A claim going to a court's subject-matter jurisdiction may be raised at any point in the litigation by any party, even the first time on appeal. *See Freytag v. Commissioner*, 501 U.S. 868, 894-895, 111 S. Ct. 2631, 2646-2647, 115 L. Ed. 2d 764 (1991) (Scalia, J., concurring in judgment).

The Tenth Circuit found the Petitioners Indian Civil Rights Act arguments, and thus the Navajo Courts' finding of its jurisdiction within the Indian Civil Rights Act (P. L-10) that jurisdiction must apply based upon the equal protection mandates of 25 U.S.C. § 1302, applicable to all the defendants, particularly here counterclaiming, unpersuasive. "Appellants contend that the Navajo court's actions respecting Ickes [actually to all the defendants' Navajo counterclaims] are sanctioned by federal law, namely 25 U.S.C. § 1302. This argument is utterly devoid of any merit." (P. App. 16a).

The *Enas* court found unanimously 25 U.S.C. § 1302 did most certainly apply to defendants in a criminal context, so that Supreme Court decisions of *Duro v. Reina*, 495 U.S. 676 (1990); *Oliphant v. Suquamish Indian Tribe*, 435 U.S. 191 (1978); and *United States v. Wheeler*, 435 U.S. 313, 328 (1978), (based on the "implicit divestiture" theory that narrowed Tribal Court jurisdiction beginning with *Oliphant*), were not based upon a Constitutional, but federal common law, and the Congressional clear and unambiguous enactments were the authority in defining a Tribal Court's exercise of the Tribe's inherent sovereignty.[6]

Similarly to *Enas*' application of the Indian Civil Rights Act Courts' jurisdiction to *Duro*; *Oliphant*; and *Wheeler*, the Plaintiffs here argue that the clear wording of the Indian Civil Rights Act takes precedence over the tribal jurisdictional narrowing theories found *Montana* (presumption against tribal jurisdiction over non-Indians), and its progeny in *Strate v. A-1 Contractors*, 520 U.S. 438 (1997) (no tribal jurisdiction

6. *Enas*' certiorari petition was denied about one week after this case had oral argument, and briefing at the appeals court was closed. It was discovered recently.

over dangerous driving by non-Indians); *Atkinson Trading Post v. Shirley*, 121 S. Ct. 1825 (2001) (a ill defined and ambiguous and arbitrarily applied "nexus" test), and *Nevada v. Hicks*, 121 S. Ct. 2304 (2001) ("inherent state jurisdiction" over tribes), originating in *Oliphant*'s *theory* of "implicit divestiture" that is unmoored from previous precedence and statutes, and now the 1992 ratified treaty of the United Nation International Covenant on Political and Civil Rights that has become the "supreme law of the land". U.S. Constitution, Article VI, Supremacy Clause. Congress has never granted any immunity from Tribal jurisdiction to *non-Indians*, based primarily on their national origin, as *Montana*.

III. The Tenth Circuit Court's Dismissal and Remand Conflicts with the "Supreme Law of the Land"

Notably, both the 1993 and 2000 Tribal Justice Support Acts, *after Oliphant* and *Montana*, and help implement the June 8, 1992 ratification of the United States treaty of the **United Nations International Covenant on Civil and Political Rights**, (UNICPCR) 2200A (XXI) of 16 December 1966 *entry into force* 23 March 1976, in accordance with Article 49. The United States has committed to this international body to "promote the realization of the *right* of self-determination and shall respect that *right*, in conformity with the provisions of the Charter of the United Nations." for *persons* on trust lands. UNICPCR Part 1, Article 1, sec. 3. The Courts shall apply the laws to "everybody" equally. Part III, Article 14, Sec.1. The Navajo Courts are bound in their dependant status to uphold this Treaty, that no "state", or "anything in the Constitution" can violate. So is Utah and its political subdivisions and federal courts in the protection of Navajo laws.

> **This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and** *all Treaties* **made, or** *which shall be made*, **under the Authority of the United States,** *shall be the supreme Law of the Land*; **and the Judges in every State shall be bound thereby,** *any Thing in the Constitution* **or** *Laws of any state* **to the Contrary notwithstanding.**

U.S. Constitution, Article VI. Emphasis added.

In fact, the Department of State in 1994, in a report on this treaty to the United Nations, ignored *Oliphant* and its progeny.[7] "The trust obligation is *a strict fiduciary standard* that applies to all departments of the government that deal with Indians, not just the departments specifically charged with responsibility for Indian affairs."[8] (P. L-143). *See also* CHAPTER XI, DECLARATION REGARDING NON-SELF-GOVERNING TERRITORIES, Article 73, charging the United States with a "sacred trust obligation".

7. "The Supreme Court has held that tribal courts are the proper forum for the adjudication of civil disputes involving Native Americans and non-Native Americans arising on a reservation." *Fisher v. District Court*, 424 U.S. 382 (1976). Tribal authority over the activities of non-Indians on reservation lands is an important part of tribal sovereignty, and, as a result, "[c]ivil jurisdiction over such activities *presumptively lies* in the tribal courts, unless affirmatively limited by a specific treaty provision or federal statute." *Iowa Mutual Ins. Co. v. LaPlante*, 480 U.S. 9, 18 (1987) . . . The United States also has a more general trust relationship with the Indian people, *United States v. Mitchell*, 463 U.S. 206, 225 (1983) (Mitchell II), and that relationship creates an overriding duty to *deal fairly* with all Indians. *Morton v. Ruiz*, 415 U.S. 199, 236 (1974). (P. L-143).

8. U.S. Department of State report to the United Nations. http://dosfan.lib.uic.edu/ERC/law/Covenant94/Specific_Articles/01.html.

IV. The Tenth Circuit Court Dismissal Conflicts with Statutes

In 1968, Congress enacted the Indian Civil Rights Act, 25 U.S.C. §§ 1301-03.[9] The history of this act shows, as Navajo Nation Supreme Chief Judge Yazzi points out (P. L-40), that the Senate Judiciary Committee purposefully and selectively used the words "any persons" instead of "members of the tribe" for whom the equal protection provisions of the Navajo government applies, equal to the provisions of the Fourteenth amendment.[10] Congress need not rewrite another amendment to express clearly its intent when it used "any person" in 25 U.S.C. § 1302. It is unambiguous. "Any" is an all encompassing word meaning

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9. The Indian Civil Rights Act was originally passed by the Senate on December 7, 1967, as a stand-alone measure containing six titles. S. 1843 (as amended), 90th Cong. (1967); *see* 113 Cong. Rec. 35,473 (1967). The bill was finally enacted as Titles II through VII of a broader civil rights measure, the Civil Rights Act of 1968, Pub. L. 90-284, 82 Stat. 73, 77. We refer to the Title designations in S. 1843. *See Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 51 n.1 (1978); *Poodry v. Tonawanda Band of Seneca Indians*, 85 F.3d 874, 881 n.9 (2d Cir.), *cert. denied*, 117 S. Ct. 610 (1996).

10. "Originally the Department of Interior's proposed equal protection provision applied only to 'any member of the tribe' within the jurisdiction of the tribal government's equal protection under the tribe's laws, a lesser standard than that of the Fourteenth Amendment." The Judiciary Committee decided instead to guarantee "*any person*" located within the tribe's jurisdiction equal protection under the tribe's laws, S. Rep. No. 90-841, at 2, thereby making the scope of the clause equal with that of the Fourteenth Amendment. Comments of Chief Judge Yazzi before the Senate Committee on Indian Affairs. *See also Dodge v. Nakai*, 298 F. Supp. 17 (D. Ariz. 1968) for this history of the Indian Civil Rights Act.

"asserting without limitation". WEBSTER'S REVISED UNABRIDGED DICTIONARY (1913).

Under *Enas*'s holding, and the clear and unambiguous language of statutes, this Court can sustain, under principals of full faith and credit, the Navajo Court Orders as an exercise of 'inherent sovereign' rights **(25 U.S.C. § 1301(2))** to "enact and enforce laws" **(25 U.S.C. § 3665)** within the confines of due process and equal protection, to "any person" **(25 U.S.C. § 1302)** in "Indian lands" the Tribes are "responsible" for governing, as the "most appropriate" Courts for resolving civil disputes in "suits at law" **(25 U.S.C. § 1351)**, based upon the Navajo Nation's right to enact and enforce their laws **(25 U.S.C §§ 3665(1), 3601, 3602)**, for Indians and non-Indians alike.[11] If the intent of Congress is clear and unambiguous, judicial inquiry stops.[12] Congress again used

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11. *See Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 65 & n.21 (1978); *see, e.g.*, 25 U.S.C. §§ 450, 450a (Indian Self-Determination and Education Assistance Act, funding and assistance for tribal government institutions, including courts); 25 U.S.C. § 476, *et seq.* (Indian Reorganization Act, reorganization of tribal governments); 25 U.S.C. § 1301, *et seq.* (Indian Civil Rights Act of 1968, recognizing powers of tribal self-government, establishing bill of rights, and providing for development of model code of Indian offenses for tribal courts); 25 U.S.C. § 3601, *et seq.* (Indian Tribal Justice Act, establishing Office of Tribal Justice Support within Bureau of Indian Affairs to assist tribal courts). *See* Department of Justice Policy on Indian Sovereignty and Government-to-Government Relations, 61 Fed. Reg. 29,424 (1996).

12. *Burke Mountain Recreation, Inc. v. Vermont Development Credit Corporation* (In re Burke Mountain Recreation, Inc.), 64 B.R. 799, 802 (Bkrtcy. D. Vt. 1986) ("If the language is plain, the intent must be ascertained from the language itself.") (citations omitted);

(Cont'd)

its plenary powers in the year 2000 "Indian Tribal Justice Technical and Legal Assistance Act of 2000" amending the previous Indian Tribal Justice Support Act, 25 U.S.C. §§ 3601, 3602 (1993).[13] (P. L-56-59). 25 U.S.C. §§ 3651, *et seq*.

(Cont'd)

In re Keinath Brothers Dairy Farm, 71 B.R. 993 (Bkrtcy. E.D. Mich. 1987) (conflicting United States Supreme Court and Federal cases representing both schools, *i.e.*, those that permit further inquiry, and those that do not, when plain meaning rule is applicable; held plain language would be given effect notwithstanding contrary language in legislative history).

13. The Senate Report accompanying that Act explained that "**tribal courts are permanent institutions *charged with resolving the rights and interests of both Indian and non-Indian individuals***." S. Rep. No. 88, 103d Cong., 1st Sess. 8 (1993). Emphasis added. And the Conference Report stated that "civil jurisdiction on an Indian reservation '*presumptively lies in tribal court, unless affirmatively limited by a specific treaty provision or federal statute.*'" H.R. Conf. Rep. No. 383, 103d Cong., 1st Sess. 13 (1993) (*quoting Iowa Mut. Ins. Co. v. LaPlante*, 480 U.S. 9, 18 (1987)). *See also* Indian Tribal Justice Technical and Legal Assistance Act of 2000, 25 U.S.C. § 3651, §§ 2, 101, 106, 201, 202, Pub. L. No. 106-559, 114 Stat. 2778 amended the Indian Tribal Justice Act by stating "(2) Indian tribes are sovereign entities and *are responsible for exercising governmental authority over Indian lands*; . . . (6) Congress and the Federal courts have repeatedly recognized tribal justice systems as the *most* appropriate forums for the adjudication of disputes affecting personal and property rights on Native lands; . . ." Further, Congress in section (11) of the act authorized appropriations to build *strong* Tribal Court systems. Congress made no distinctions regarding inherent sovereignty jurisdiction of Tribal Courts based upon national origin of the entities or persons. *See* the Navajo Contract amounts. (P. L-56-59).

If there was a statutory ambiguity, in keeping with the fiduciary relationship of tribes, the Supreme Court has stated frequently, these statutes are to be, "liberally construed, doubtful expressions being resolved in favor of the Indians." *Alaska Pacific Fisheries v. United States*, 248 U.S. 78, 89 (1918). Congress has determined the Tribe's are "responsible" for the governance of Indian lands, and their courts are the "most" appropriate forums for doing so. 25 U.S.C. §§ 3601, 3602, 3651, and 3665.

The Navajo Nation is a federally recognized Indian Tribe[14] signing the Treaty of 1868.[15] The Navajo Nation's Courts are essential to self-governance, and ability to define itself with self-determination and to "determine *the role of the tribal justice system within the tribal government or to enact and enforce tribal laws.*"[16] 25 U.S.C. § 3665(1).

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14. "The Navajo Nation is the largest Indian nation in the United States [w]ith a citizenship of almost 300,000 enrolled members the Navajo Nation courts provides services to almost thirteen percent of all the federally recognized Indians within the United States." Testimony of Navajo Nation Supreme Court Chief Judge Yazzi before the Senate Committee on Indian Affair, 2002. (P. L-41).

15. The Treaty of 1868 stated in Article 10. *No future treaty for the cession of any portion or part of the reservation herein described, which may be held in common, shall be of any validity or force against said Indians unless agreed to and executed by at least three-fourths of all the adult male Indians occupying or interested in the same.* No part of the Treaty of 1868 alludes to any control over Indians without their permission of any entity other than the United States.

16. The **Navajo** courts process roughly 90,000 cases annually. In fiscal year 2001, statistics illustrate that **Navajo** courts dealt with a caseload of 88,000 cases. The **Navajo judicial** system is a two-tiered

(Cont'd)

For that reason, this Court has recognized that tribal courts are an "appropriate forum[]" — **sometimes the exclusive forum** — for the adjudication of "disputes affecting important personal and property interests of both Indians and non-Indians." *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 65 (1978) (emphasis added). The Court has rejected attacks on the institutional competency of tribal courts as "contrary to. . . . congressional policy," *Iowa Mut.*, 480 U.S. at 19, and to its own precedents, *Santa Clara Pueblo*, 436 U.S. at 65-66.

V. The Tenth Circuit Dismissals Conflict with the Laws of Territories

The Navajo Court also found that its authority over non-Indian defendants was based upon a "territorial" premise. *Enas'* reasoning is consistent with prior Supreme Court rulings that U.S. territories are subject to the ultimate control of *Congress*. *Binns v. United States*, 194 U.S. 486, 491 (1904) ("It may legislate directly in respect to the local affairs of a territory, or transfer the power of such legislation to a

(Cont'd)

> system. . . . There are seven district courts or trial courts located throughout the **Navajo** Nation. These courts generally have four divisions: (1) District Court; (2) Family Court; (3) Small Claims Court; and (4) the Peacemaker Division. . . . Eighteen judges make up the **Navajo** judiciary. . . . Three appellate judges preside in the Supreme Court. One appellate judge is the Chief Justice and the other two are Associate Justices.

Comments of Navajo Nation Chief Judge Yazzie before the Senate Committee on Indian Affairs, 2002. (P. L-41). Undisputably, the Navajo Rules of Civil Procedure nearly mirror the Federal Rules of Civil Procedure and the Navajo Nation has adopted the ABA Model Rules of Professional Conduct. (Pet. App. 15a).

legislature elected by the citizens of the territory"); *De Lima v. Bidwell*, 182 U.S. 1, 196 (1901) (Congress "has full and complete legislative authority over the people of the territories and all the departments of the territorial governments. It may do for the territories what the people, under the Constitution of the United States, may do for the states."); *Mormon Church v. United States*, 136 U.S. 1, 42-43 (1890) (Having rightfully acquired said territories, the United States government was the *only one* which could impose laws upon them, and its sovereignty over them was complete. *No state of the Union had any such right of sovereignty over them*; no other country *or government* had any such *right*.); *Murphy v. Ramsey*, 114 U.S. 15, 44-45 (1885).

> But in ordaining government for the territories, and the people who inhabit them, *all* the discretion which belongs to legislative power is vested in congress; and that extends, beyond all controversy, to determining by law, from time to time, the form of the local government in a particular territory, and the qualification of those who shall administer it.

Emphasis added. In *Nevada v. Hicks*, 121 S. Ct. 2304 (2001) the idea of "inherent state jurisdiction" over Indian territories is *exactly opposite* to any Congressional findings and the Treaty of 1868 that cited *only* the United States would govern the Tribe, mentioning nothing of State authority over Indian Country.

Congress found in the Indian Self-Determination Act, that § (2) "the *Indian people will never surrender their desire to control their relationships* both among themselves and *with non-Indian governments, organizations, and*

persons." 25 U.S.C. § 450(2). Emphasis added.[17] Some states do not afford full faith in credit to Tribal decisions, others agree and do[18] jurisdiction is defined by statute. Here, the Tenth Circuit Court did not cite to or rely upon any evidence contrary to the Navajo Court findings that there were no due process violations of any type. (P. L-4, 5).

VI. The Tenth Circuit Dismissal Conflicts with the Spirit of Executive Orders

Further clarifying the scope of Indian Tribes over non-Indians, Executive Order 13175 signed by President Clinton on November 6, 2000[19], and President Bush's Proclamation

17. Many of today's great, or great-great grandchildren of a Indian tribal member can attest to the idea of pioneer intermarriage, trapping, hunting schools, farming, and business arrangements with tribes by non-Indian persons, subject completely to Indian rule while traveling, living, or working in Indian territory. With today's sophisticated Court systems in the Navajo Nation, often staffed by college trained or very experienced and mature lawyers and advisors, full due process equal protection for *all persons*, as is demanded by the Navajo Nation Bill of Rights, are in keeping with the Navajo cultural norms of politeness and hearing each person speak.

18. *See Fredericks v. Eide-Kirschmann Ford, Inc.*, 462 N.W.2d 164 (N.D. 1990); *Barrett v. Barrett*, 878 P.2d 1051 (Okla. 1994); *Gesinger v. Gesinger*, 531 N.W.2d 17 (S.D. 1995); *In re Custody of Sengstock*, 477 N.W.2d 310 (Wis. Ct. App. 1991); *In re Marriage of Red Fox*, 542 P.2d 918 (Or. Ct. App. 1975); *cf. Jones v. Meehan*, 175 U.S. 1, 31-32 (1899).

19. **Sec. 2.** Fundamental Principles. In formulating or implementing policies that have tribal implications, agencies shall be guided by the following fundamental principles:

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of November 12, 2001, supporting this Executive Order states, "My Administration will continue to work with tribal governments on a *sovereign* to *sovereign* basis. . . . We will protect and honor *tribal sovereignty* and help to stimulate economic development in reservation communities."

Unquestionably, Executive Departments are carrying out Congress' affirmatively avowed goal in the Indian Tribal Justice Act, 25 U.S.C. § 3601, *et seq*. and 2000 amendments, that Tribes possess "inherent authority to establish their own form of government, including tribal justice systems," which are "important forums for ensuring public health and safety and the political integrity of tribal governments" and are "the appropriate forums for the adjudication of disputes affecting personal and property rights." 25 U.S.C. §§ 3601(4)-(6). (P. L-122, 123, 124, 126, 128). The current Contract between the United States and the Navajo Nation to carry out its laws and the Indian Civil Rights act, (P. L-144-145) is in keeping with all of the foregoing, and using full faith and credit, these

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> 1. . . . . The Federal Government has enacted numerous statutes and promulgated numerous regulations that establish and define a *trust relationship* with Indian tribes.
>
> 2. . . . . Indian tribes exercise inherent sovereign powers over their members *and territory*. The United States continues to work with Indian tribes on a *government-to-government basis* to address issues concerning Indian tribal self-government, tribal trust resources, and Indian tribal treaty and other rights.
>
> 3. The United States recognizes the right of Indian tribes to self- government and supports *tribal sovereignty* and self-determination.

Navajo Court orders, any ambiguities being construed favorably by the Tribes, should be carried out by all Federal Courts, as to all the defendants that caused "an action to occur" within Indian Country as defined by the Navajo Nation Title 7 Chapter 253. Supreme Court cases point in opposing directions. *Compare United States ex rel. Mackey v. Coxe*, 59 U.S. (18 How.) 100, 103 (1855) (holding that the Cherokee Nation was a "territory" for purposes of a federal letters of administration law), *with New York ex rel. Kopel v. Bingham*, 211 U.S. 468, 474-75 (1909) (citing, with approval, *Ex Parte Morgan*, 20 F. 298, 305 (W.D. Ark. 1883).

VII. This Issue is One of Great Governmental Importance

The Tribal Court, as inherent authority within their governments must protect its citizens from harm from perpetrators that are "like a scavenging parasite of people ignorant of the harm of their malignant acts, and who lack any remorse for their harm" (P. L-1) be they drunk drivers on state roads, spouses, parents, business persons, or, as here, health care providers breaking the terms of their IHS contract, and Utah State Merit system act because they are non-Indians and immune, chilling Navajo rights and confidence in their government. (P. App. 92a)

"In short, the **Navajo** Nation is faced with nothing less than a threat of cultural, economic, and political genocide. In the end, we are talking about territorial integrity." Navajo Nation Chief Justice Robert Yazzi, (P. L- 40).

CONCLUSION

Based upon the foregoing, this Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

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APPENDIX

APPENDIX A — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT DATED AND FILED OCTOBER 7, 2002

UNITED STATES COURT OF APPEALS
TENTH CIRCUIT

No. 01-4001

DR. STEVEN MACARTHUR; DR. NATHANIEL PENN; MICHELLE LYMAN; HELEN VALDEZ; CANDACE LAWS; PAUL KEITH; DOROTHY KEITH; LINDA CACAPARDO; SUE BURTON; AMY TERLAAK; ALISON DICKSON; CANDACE HOLIDAY; NICOLE ROBERTS; DONNA SINGER; FRED RIGGS,

Plaintiffs-Appellants,

v.

SAN JUAN COUNTY; SAN JUAN HEALTH SERVICES DISTRICT; J. TYRON LEWIS, Commissioner; BILL REDD, Commissioner; CRAIG HALLS; MARK MARYBOY, Commissioner, official capacity only; REID M. WOOD; CLEAL BRADFORD; ROGER ATCITTY; JOHN LEWIS; JOHN HOUSEKEEPER; KAREN ADAMS; PATSY SHUMWAY; DR. JAMES D. REDD; DR. L. VAL JONES; DR. MANFRED R. NELSON; RICHARD BAILEY; SAN JUAN FOUNDATION; MARILEE BAILEY; ORA LEE BLACK; GARY HOLLADAY; LORI WALLACE, also known as Laurie Walker; FARMER'S/TRUCK INSURANCE; ST. PAUL'S INSURANCE; CARLA GRIMSHAW; GLORIA YANITO; JULIE BRONSON; R. DENNIS ICKES; LAURIE SCHAFER,

Defendants-Appellees.

Appendix A

Appeal from the United States District Court
for the District of Utah
(D.C. No. 00-CV-584-K)

Before **EBEL**, **McKAY**, and **LUCERO**, Circuit Judges.

LUCERO, Circuit Judge.

Key to our determination of this appeal is the question whether the courts of the Navajo Nation may exercise jurisdiction over a case brought by private individuals against a Utah county alleging violations of Navajo law. Contrary to the district court's ruling, we conclude that resolution of this question lies in *Montana v. United States*, 450 U.S. 544 (1981) (defining the scope of tribes' inherent sovereignty), rather than in the doctrine of state sovereign immunity.

I

The parties bring to us a procedural quagmire marked by a profound lack of clarity—at times approaching confusion—in their litigation before the Navajo Nation district court and their pleadings before the federal district court below. That pattern continues here.

Rather than including a complete statement of relevant facts as required by Fed. R. App. P. 28, appellants' opening brief incorporates facts as stated in a Navajo Nation judicial record. Appellants fail to comply with Fed. R. App. P. 30(a)(1)(B), which requires the filing of an appendix to the briefs including "relevant portions of the pleadings." This being an appeal from a Fed. R. Civ. P. 12(b)(6) dismissal for the complaint's failure to state a claim upon which relief

may be granted, Rule 30(a)(1)(B) requires, at a minimum, inclusion in the appendix of the complaint at issue. *See* 10th Cir. R. 30.1(A)(1) (stating that the appendix to the briefs must be "sufficient for considering and deciding the issues on appeal"). Were it not for appellees' submission of the complaint, we would be inclined to affirm the district court's dismissal on this basis alone. *See* 10th Cir. R. 30.1(A)(3) (stating that this court is not obliged to "remedy any failure of counsel to provide an adequate appendix").

As best as we can tell, the facts are as follows.

A

Montezuma Creek Clinic is located within the boundaries of the Navajo Nation and was, during relevant times, operated by the San Juan Health Service District ("Health District")—a special service district organized by San Juan County, Utah ("County")—under contract with the federal Indian Health Service ("IHS") to provide health care to members of the Navajo community. The clinic and land upon which it is located was purchased by the State of Utah as part of the Utah Navajo Trust Fund.

In April 1999, Fred Riggs, Donna Singer, and Alison Dickson, all of whom were employed at the clinic, sued the Health District and County, among others,[1] in Navajo Nation

1. Sued in the Navajo court action were the Health District; chairman of the district governance board Roger Atcitty; former governance board member John Lewis; governance board members Karen Adams and Patsy Shumway; and district director of patient

(Cont'd)

district court for, among other things, alleged violations of the Navajo Preference in Employment Act ("NPEA"), Nation Code tit. 15, § § 601-609.[2] The NPEA, which was enacted by the Navajo Nation, requires employers to "[g]ive preference in employment to Navajos," *id.* § 604(A)(1), and to file with the Office of Navajo Labor Relations a written affirmative-action plan, § 604(A)(2).

In pretrial proceedings, the Navajo court concluded that Riggs, Singer, and Dickson demonstrated a substantial likelihood of success on the merits of their NPEA claims and entered a preliminary injunction in their favor. The Navajo court was troubled by what it perceived as a sharp drop in visits to the clinic by diabetic patients. In the court's

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care Laurie Shafer. (*See* 2 Appellants' App. at 176 n.5.) Also sued were San Juan County, Utah; county commissioners J. Tyron Lewis, Mark Maryboy, and Bill Redd; county attorney Craig Halls; and county administrator Richard Bailey. (*See* 2 *id.* at 176 n.4.) Except for Shumway and Maryboy, who were sued in their official capacities only, the individual defendants were sued in both their official and personal capacities.

2. Appellants' claim that "[t]hey brought only Navajo law claims before the Navajo tribunal" is incorrect. (*See* Health District Appellees' App. at 247 (Navajo court complaint)) (setting forth a claim entitled "The Right to Free Speech as Protected by the Navajo Nation, the United Nations, and the United States"); *id.* at 248 ("Freedom to Assemble as Protected by the Navajo Nation, the United Nations, and the United States."); *id.* at 249 ("The right to Due Process protected by the Navajo Nation, United Nations, and the United States."); *id.* at 255 ("The Right of Equal Protection Specifically Protected by the Navajo Nation, the United Nations, [and] the United States.").

view, "The reason these patients have not been coming in for life critical medical care is due to San Juan Health Service District's billing of IHS eligible patients, making them believe they must pay for medical services before receiving medical attention." (1 Appellants' App. at 77.) Under the preliminary injunction, the County and Health District were required to reinstate Singer and Riggs to their prior positions at the clinic; to give Dickson full-time employment status; to compensate Singer, Riggs, and Dickson for their lost income; to expunge Singer's and Riggs's personnel files; and to pay attorney's fees. Moreover, the Navajo court prohibited the County and Health District from:

> Eliminating Emergency Medical Technician services and coverage within the territorial jurisdiction of the Navajo Nation in service to the local Navajo and other Native American population for or on behalf of the Montezuma Creek Clinic; and, Interfering with the laboratory services to the Montezuma Creek Clinic; and, Interfering with the pharmaceutical services provided to the Montezuma Creek Clinic, and immediate payment of all current and past due billings; and, Interfering with any form of patient care, by, among any other matter or things, billing IHS patients; and Interfering or harassing Ms. Singer as the manager of the Montezuma Creek Clinic. . . .

(1 *id.* at 85-86.)[3]

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3. The Navajo court also held "[t]hat in the event that the defendants fail to obey the Order of this Court, commencing the [fourth] day of March, 2000, the defendants shall be fined at the rate

(Cont'd)

Appendix A

In its order granting a preliminary injunction, the Navajo court found that the defendants had engaged in a pattern of bad faith conduct toward the court, had wasted judicial resources, had engaged in "repeated misrepresentations of fact and law," had engaged in evidence spoliation, had intimidated and tampered with witnesses, had obstructed testimony, and had engaged in the sandbagging of evidence. (1 *id.* at 80.) In the Navajo court's view, the defendants had made frivolous claims against Navajo plaintiffs and subjected them "to a trial by tabloid." (1 *id.* at 81.) Seizing on these conclusions, Riggs, Singer, and Dickson modified their complaint to add as defendants the clinic's insurer, Truck Insurance Exchange ("Truck Insurance"), and its attorney, R. Dennis Ickes. On May 3, 2000, the Navajo court took the extraordinary step of holding that Truck Insurance and Ickes should be bound by the preliminary injunction. The court also granted Riggs, Singer, and Dickson leave to seek enforcement of the preliminary injunction in state or federal court "pursuant to principles of comity and applicable law." (1 *id.* at 106.)

(Cont'd)

of $10,000.00 . . . per day, for each and every day the Order of this Court is not carried out in its entirety." (1 Appellants' App. at 104.) Moreover, the court ordered "[t]hat each and every personal defendant and defendants [*sic*] counsel will pay $1000 per day of the $10,000 daily fine beginning March 2, 2000, [*sic*] from their own personal assets." (*Id.*)

Appendix A

B

Riggs, Singer, Dickson, and twelve other individuals filed a complaint in United States district court against (1) the County, Health District, and a number of County and Health District officials ("County and Health District defendants"); (2) Truck Insurance; and (3) Ickes. The complaint listed various causes of action: discrimination and denial of equal protection; denial of free speech and association; denial of due process; antitrust and racketeering violations; fraud, conversion, and theft; and invasion of privacy and defamation. Their complaint also sought enforcement of the Navajo court preliminary injunction and "a declaratory judgment that the Preliminary Injunction Order designed to protect the welfare of the Navajo Nation was issued within the sound jurisdiction of the Navajo Nation District Court and is authoritative over the defendants and the political subdivision" (Health District's Supplemental App. ("H.D. App.") at 46). The complaint asserted: "Pursuant to *Strate v. A-1 Contractors*, 117 S. Ct. 1404 (1997) [the] Navajo Nation District Court . . . has the right to protect the Navajo Patients' health and welfare, contractual rights of the Navajo people, and the civil rights of all those who are within the Navajo Nation boundaries and seek [the] Court's assistance." (H.D. App. at 48.)

Ruling on a motion to dismiss, the district court held that County and Health District defendants were entitled to sovereign immunity in the Navajo court. Reasoned the district court:

> [T]ribal courts historically did not possess and therefore have not retained sovereign powers over

> states. Therefore, absent a state's express waiver of immunity, a state cannot be sued in tribal court. . . . Consequently, political subdivisions of the State of Utah, as defined by Utah law, are immune from suit in tribal courts because the State of Utah has not waived the common law immunity of its political subdivisions from suit in tribal courts.

(2 Appellants' App. at 185.) In a separate decision, the district court dismissed plaintiffs' claim as against Truck Insurance and Ickes. Applying *Montana v. United States*, the district court held that the Navajo court lacked subject-matter jurisdiction over them.

Appellants seek review of the district court decisions.[4]

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4. The district court did not act on appellants' other claims, and consequently, this court originally lacked jurisdiction over this appeal. Title 28 U.S.C. § 1291 grants the courts of appeal "jurisdiction of appeals from all final decisions of the district courts of the United States." Ordinarily, an appealable final judgment is one that terminates "all matters as to all parties and causes of action." *D & H Marketers, Inc. v. Freedom Oil & Gas, Inc.*, 744 F.2d 1443, 1444 (10th Cir. 1984) (en banc).

While this matter was pending, however, the district court exercised its discretion under Fed. R. Civ. P. 54(b) to direct entry of final judgment on plaintiffs' Navajo preliminary injunction claim. As a result, this court now has jurisdiction over this appeal under § 1291. *See Seatrain Shipbuilding Corp. v. Shell Oil Co.*, 444 U.S. 572, 583-84 (1980).

C

We review the district court's dismissal of appellants' claims under Rule 12(b)(6) for failure to state a claim de novo. *Sutton v. Utah State Sch. for the Deaf & Blind*, 173 F.3d 1226, 1236 (10th Cir. 1999). At this stage of the litigation, we accept all well-pleaded allegations in the complaint as true and will sustain the district court's Rule 12(b)(6) dismissal only if it is clear beyond doubt that no relief could be granted under any set of facts that could be proved consistent with the allegations. *Id.* Our role in this context "is not to weigh potential evidence that the parties might present at trial, but to assess whether the plaintiff's complaint alone is legally sufficient to state a claim for which relief may be granted." *Id.* (quotation omitted). "Indeed it may appear on the face of the pleadings that a recovery is very remote and unlikely but that is not the test." *Scheuer v. Rhodes*, 416 U.S. 232, 236 (1974), *overruled on other grounds by Harlow v. Fitzgerald*, 457 U.S. 800 (1982).

In deciding a Rule 12(b)(6) motion, a federal court generally "should not look beyond the confines of the complaint itself." *Dean Witter Reynolds, Inc. v. Howsam*, 261 F.3d 956, 960 (10th Cir. 2001), *cert. granted*, 122 S. Ct. 1171 (2002). There are two exceptions to this rule. First, the district court may consider "mere argument" contained in the parties' memoranda concerning a motion to dismiss. *Ohio v. Peterson, Lowry, Rall, Barber & Ross*, 585 F.2d 454, 457 (10th Cir. 1978). Second, "[i]t is accepted practice, if a plaintiff does not incorporate by reference or attach a document to its complaint, but the document is referred to in the complaint and is central to the plaintiff's claim, a defendant may submit

an indisputably authentic copy to the court to be considered on a motion to dismiss." *Howsam*, 261 F.3d at 961 (quotation omitted).

As stated above, appellants' failure to submit a copy of their complaint to this court on appeal is rendered less harmful by appellees' submission of that crucial document. However, the district court docket entries indicate that appellants filed attachments and an addendum to their complaint on July 26, 2000. We are at a loss as to the contents of these filings. Although it seems clear that the district court relied on facts beyond those alleged in the body of the complaint, there is no way to know from the record before us whether these factual allegations are reflected in the attachments to the complaint. Because appellants do not challenge the district court's decisions on grounds that the court exceeded the proper scope of Rule 12(b)(6) review, we defer to the district court's statements of factual allegations.

II

We first consider whether the district court properly dismissed appellants' claims against Truck Insurance and Ickes.

A

Long before the arrival of Europeans on this continent, tribes were self-governing political communities. *Nat'l Farmers Union Ins. Cos. v. Crow Tribe*, 471 U.S. 845, 851 (1985). As such, the tribes possessed the full attributes of sovereignty, which included "the inherent power to prescribe laws for their members and to punish infractions of those laws." *United States v. Wheeler*, 435 U.S. 313, 323 (1978). Although "[t]heir incorporation within

the territory of the United States, and their acceptance of its protection necessarily divested them of some aspects of the sovereignty which they had previously exercised," *id.*, this divestiture was not absolute. Today, tribes retain sovereignty of a

> unique and limited character. It exists only at the sufferance of Congress and is subject to complete defeasance. But until Congress acts, the tribes retain their existing sovereign powers. In sum, Indian tribes still possess those aspects of sovereignty not withdrawn by treaty or statute, or by implication as a necessary result of their dependent status.

Id.

As Felix Cohen observed in his seminal work on the subject of federal Indian law, "[T]hose powers which are lawfully vested in an Indian tribe are not, in general, delegated powers granted by express acts of Congress, but rather inherent powers of a limited sovereignty which has never been extinguished." Felix S. Cohen, *Handbook of Federal Indian Law* 122 (1941); *see Wheeler*, 435 U.S. at 322. Contrary to County defendants' assertion on appeal (*see* County Appellees' Br. at 20), tribes are not subordinate to the states, *see Washington v. Confederated Tribes*, 447 U.S. 134, 154 (1980), and certainly not to counties.[5]

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5. We must reject County appellees' assertion "that the natural dominion of States and their political subdivisions over tribal governments was clearly established before the United States *Constitution* came into being and that there has been nothing post *Constitution* to change that fact" (County appellees' Br. at 20).

Appendix A

The leading case defining the scope of tribal inherent civil authority is *Montana v. United States*. *Montana* articulates the general rule that "exercise of tribal power beyond what is necessary to protect tribal self-government or to control internal relations is inconsistent with the dependent status of the tribes, and so cannot survive without express congressional delegation." 450 U.S. at 564. Generally, "the inherent sovereign powers of an Indian tribe do not extend to the activities of nonmembers of the tribe." *Id.* at 565. But there may be cases in which inherent civil authority will extend to the conduct of non-Indians on reservations. First, "[a] tribe may regulate, through taxation, licensing, or other means, the activities of nonmembers who enter consensual relationships with the tribe or its members, through commercial dealing, contracts, leases, or other arrangements." *Id.* Second, "[a] tribe may also retain inherent power to exercise civil authority over the conduct of non-Indians on fee lands within its reservation when that conduct threatens or has some direct effect on the political integrity, the economic security, or the health or welfare of the tribe." *Id.* at 566.

In a pair of subsequent cases, the Supreme Court applied *Montana* to address the scope of inherent civil *adjudicative* authority as well, holding that "[a]s to nonmembers . . . , a tribe's adjudicative jurisdiction does not exceed its legislative jurisdiction." *Strate v. A-1 Contractors*, 520 U.S. 438, 453 (1997); *Nevada v. Hicks*, 533 U.S. 353, 357-58 (2001). In *Hicks*, the Court acknowledged that this "formulation leaves open the question whether a tribe's adjudicative jurisdiction over nonmember defendants *equals* its legislative jurisdiction." 533 U.S. at 358.

Appendix A

B

In evaluating appellants' declaratory judgment claim against Truck Insurance, the district court stated that in April 1999,

> there was in effect a Comprehensive Hospital Liability Policy issued by Truck, which, among other things, covered the Montezuma Creek Clinic, which was operated by the San Juan Health Services District. . . . Consequently, Truck retained Mr. Ickes to represent the District and related defendants . . . in the Tribal Court action. Because, there were coverage issues as to many of the claims brought by Plaintiffs in the Tribal Court proceedings, however, Mr. Ickes was retained solely to represent the interests of Truck's insureds. Mr. Ickes was not retained to, and has not, represented Truck at any time pertinent to this action.

(2 Appellants' App. at 198.) In their opening brief, appellants neither take issue with the district court's statement of these allegations nor contend that Truck Insurance is a member of the Navajo Nation such that *Montana's* presumption against tribal authority would not apply. Rather, they contend that Truck Insurance falls within *Montana's* consensual relationship exception. According to appellants,

> Truck's contract for liability insurance was an inherent aspect attaching to each Navajo patient's contract for services with the clinic. But for the

> Navajo patients, Truck would not have had a contract with the defendants for the clinic. Truck's contract was an inherent aspect of Attorney Ickes' representation of the defendants. Attorney Ickes kept Truck informed.

(Appellants' Br. at 28.)

We reject appellants' argument. Under *Montana's* consensual relationship exception, the relationship must be one between the nonmember and "*the tribe or its members.*" 450 U.S. at 564. Here, Truck Insurance's contractual relationship was with the *clinic*, another nonmember. Thus, the Navajo Nation's exertion of authority over Truck Insurance is too attenuated to fall under *Montana's* consensual relationship exception. *See Atkinson Trading Co. v. Shirley*, 532 U.S. 645, 656 (2001) ("*Montana's* consensual relationship exception requires that the tax or regulation imposed by the Indian tribe have a nexus to the consensual relationship itself.").

We also reject appellants' contention that their declaratory judgment claim against Ickes, who is not a member of the Navajo Nation, was improperly dismissed. Appellants claim that the Navajo Nation may regulate Ickes's activity because he entered into a consensual relationship with the tribe—i.e., he became a member of the Navajo Nation Bar Association. We agree that Ickes's membership in the Navajo Nation Bar Association and his practice before the Navajo district court constitute a consensual relationship with the Navajo Nation. However, our *Montana* inquiry does not end with this determination. As was the case with respect to Truck Insurance, the requisite nexus between the consensual relationship and the exertion of tribal authority is missing.

By enrolling as a member of the Navajo Nation Bar Association, Ickes agreed to follow the American Bar Association's Model Rules of Professional Conduct, which have been adopted by the Navajo Nation Supreme Court. Rule 8.5(a) of the Model Rules provides, "A lawyer admitted to practice in this jurisdiction is subject to the disciplinary authority of this jurisdiction. . . ." In our judgment, the power to discipline an attorney for alleged misconduct in court is distinct from the power to join the attorney as a defendant with the clients he is representing before that court.[6] As the Supreme Court observed in *Atkinson*, the rule is not "in for a penny, in for a Pound." 532 U.S. at 656 (quotation omitted).

We are also unpersuaded that *Montana's* self-government exception should apply with respect to Ickes. This exception "grants Indian tribes nothing beyond what is necessary to protect tribal self-government or to control internal relations." *Id.* at 658-59 (quotations omitted). Surely, the Navajo Nation's interest in regulating attorney conduct is great. *See Goldfarb v. Va. State Bar*, 421 U.S. 773, 792 (1975). But it is a long leap, and one we are unwilling to take, to suggest that the action taken by the Navajo court in this case was necessary to protect Navajo self-government or control its internal relations. If warranted, the Navajo Nation may protect its political integrity through other means, such as "the imposition of disbarment, suspension or reprimand of the offending attorney[ ]." *Garcia v. Rodey, Dickason, Sloan, Akin & Robb*, 750 P.2d 118, 123 (N.M. 1988).

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6. *See Garcia v. Rodey, Dickason, Sloan, Akin & Robb*, 750 P.2d 118, 122 (N.M. 1988) (collecting cases, and stating that "[a]n attorney has no duty . . . to protect the interests of a non-client adverse party for the obvious reasons that the adverse party is not the intended beneficiary of the attorney's services and that the attorney's undivided loyalty belongs to the client").

C

Appellants contend that the Navajo court's actions respecting Ickes are sanctioned by federal law, namely 25 U.S.C. § 1302. This argument is utterly devoid of any merit. Section 1302 is an express *divestiture* of tribal authority, providing, among other things, that no Indian tribe may "deny to any person within its jurisdiction the equal protection of its laws or deprive any person of liberty or property without due process of law." 25 U.S.C. § 1302(7); *see also Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 57 (1978) (stating that in § 1302, "Congress acted to . . . impos[e] certain restrictions upon tribal governments similar, but not identical, to those contained in the Bill of Rights and the Fourteenth Amendment").

D

In contrast to their claim seeking a declaratory judgment, appellants' claim for enforcement of the Navajo court's preliminary injunction with respect to Truck Insurance and Ickes raises important questions concerning the proper role of federal courts.[7] Although a tribal court *defendant* may bring a federal cause of action for an injunction where the basis of the claim is assertion of "a right to be protected

7. Because we recognize a federal right to be free from tribal court interference, it stands to reason that an action for a mere declaration that a tribal court defendant has no such right might be permitted as well. *See* Fed. R. Civ. P. 57; 10B Charles Alan Wright, et al., *Federal Practice & Procedure* § 2767, at 650 (3d ed. 1998). We do not consider, nor do we decide, whether such relief is available at this interlocutory stage of the parties' tribal court litigation.

against an unlawful exercise of Tribal Court judicial power," *Nat'l Farmers*, 471 U.S. at 851, 852, this right to be free from tribal court interference does not necessarily support a federal claim seeking enforcement of a tribal decree. Although the sovereign powers of the Navajo Nation are held "only at the sufferance of Congress," *Wheeler*, 435 U.S. at 323, these powers are rooted in Navajo, not federal, law. "Indian tribes are neither states, nor part of the federal government, nor subdivisions of either. Rather, they are sovereign political entities possessed of sovereign authority not derived from the United States, which they predate." *NLRB v. Pueblo of San Juan*, 276 F.3d 1186, 1192 (10th Cir. 2002) (en banc) (footnote omitted). To the extent appellants' complaint anticipates a defense arising under federal law, it runs up against the well-pleaded complaint rule. *See Louisville & Nashville R.R. Co. v. Mottley*, 211 U.S. 149, 152 (1908).

Appellants nonetheless seek enforcement of the Navajo court injunction under Full Faith and Credit Clause of the Constitution or, in the alternative, comity principles. Under the Full Faith and Credit Clause,

> Full Faith and Credit shall be given in each State to the public Acts, Records, and judicial Proceedings of every other State. And the Congress may by general Laws prescribe the Manner in which such Acts, Records and Proceedings shall be proved, and the Effect thereof.

U.S. Const. art. IV, § 1. Full faith and credit principles are also in place as a matter of statute:

> Such Acts, records, and judicial proceedings or copies thereof, so authenticated, shall have the same full faith and credit in every court within the United States and its Territories and Possessions as they have by law or usage in the courts of such State, Territory or Possession from which they are taken.

28 U.S.C. § 1738. According to appellants, tribes historically have been viewed as territories of the United States. In fact, Supreme Court cases point in opposing directions. *Compare United States ex rel. Mackey v. Coxe*, 59 U.S. (18 How.) 100, 103 (1855) (holding that the Cherokee Nation was a "territory" for purposes of a federal letters of administration law), *with New York ex rel. Kopel v. Bingham*, 211 U.S. 468, 474-75 (1909) (citing, with approval, *Ex Parte Morgan*, 20 F. 298, 305 (W.D. Ark. 1883), which held that the Cherokee Nation was not a "territory" within the meaning of the federal extradition statute). *See generally Wilson v. Marchington*, 127 F.3d 805, 808-09 (9th Cir. 1997) (discussing the issue at length and ultimately holding that neither the Full Faith and Credit Clause nor 28 U.S.C. § 1738 is applicable to tribal judgments). We need not address this issue because appellants admit that they

> did not argue full faith and credit in the Federal [district] Court, but upon further consideration of the full pervasiveness of the United States in Tribal Court systems, and given the need for preliminary injunctions in health and public safety emergencies, the Plaintiffs now argue full faith

> and credit is appropriate for exclusively tribal claims under the facts of this case.

(Appellants' Br. at 36 n.14.) As a general rule, this court will not consider an issue on appeal that was not pressed below, *Walker v. Mather (In re Walker)*, 959 F.2d 894, 896 (10th Cir. 1992), and we choose not to do so today. We thus proceed with the assumption that the Navajo Nation injunction is enforceable in federal court as a matter of comity.

We are unwilling to enforce judgments of tribal courts acting beyond their authority, especially where defendants have a federal right "to be protected against an unlawful exercise of Tribal Court judicial power," *Nat'l Farmers*, 471 U.S. at 851; *see Wilson*, 127 F.3d at 810 (holding that "federal courts must neither recognize nor enforce tribal judgments if: (1) the tribal court did not have both personal and subject matter jurisdiction; or (2) the defendant was not afforded due process of law"). Therefore, given our earlier conclusion that the Navajo court lacked subject-matter jurisdiction over Truck Insurance and Ickes, we must affirm the district court's dismissal of appellants' enforcement claim as against those parties.

III

We proceed to review the district court's dismissal of appellants' claims against County and Health District defendants.

A

In its memorandum decision and order, the district court ruled that the Navajo court suit against County and Health District defendants was barred by the doctrine of sovereign immunity. The Navajo court's exercise of jurisdiction over these defendants was, in the district court's view, "nonsensical" and "ludicrous." (2 Appellants' App. at 190.) The district court based its decision on constitutional sovereign-immunity principles, stressing that the Constitution never would have been ratified had the states been stripped of their sovereign authority "'except as expressly provided by the Constitution itself.'" (2 *id.* at 185 (quoting *Alden v. Maine*, 527 U.S. 706, 727 (1999)).) As exemplified by such decisions as *Alden* and *Hans v. Louisiana*, 134 U.S. 1 (1890), the federal doctrine of sovereign immunity holds that the federal government may not, as a general matter, infringe the states' immunity from private suit.

Appellants contend that the district court's analysis of their claims against County and Health District defendants should have proceeded under *Montana* and subsequent cases defining tribal inherent sovereignty. Had these principles been applied, say appellants, dismissal would have been improper.

B

We begin our analysis with the acknowledgment that federal sovereign immunity and *Montana* are distinct legal doctrines. On a practical level, however, both *Montana* and sovereign immunity may potentially divest the Navajo court of the power to adjudicate the parties' suit.[8]

The district court's reliance on federal sovereign immunity misunderstands the doctrine as defined by the Supreme Court. *See Nevada v. Hicks*, 533 U.S. 353, 373-74 (2001); *Nevada v. Hall*, 440 U.S. 410, 414 (1979) ("The doctrine of sovereign immunity is an amalgam of two quite different concepts, one applicable to suits in the sovereign's own courts and the other to suits in the courts of another sovereign."). Nonetheless, at this point in the analysis it would be premature to decide the sovereign immunity question because there remains a threshold question of the tribe's jurisdiction under *Montana*.

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8. We note that County and Health District defendants do *not* assert sovereign immunity from suit in federal court. *Cf. Lincoln County v. Luning*, 133 U.S. 529, 530 (1890) (holding that Eleventh Amendment immunity does not extend to counties, cities, or municipal corporations); *cf. also Mount Healthy City Sch. Dist. Bd. of Educ. v. Doyle*, 429 U.S. 274, 280-81 (1977) (holding that Eleventh Amendment immunity does not extend to local school districts). Moreover, it must be remembered that the County and Health District asserted their sovereign immunity defense in *Navajo court*. We sit in review of that judgment.

Appendix A

C

The threshold question in our review of the Navajo court judgment is whether the Navajo Nation's decision to exercise adjudicative power over County and Health District defendants passes muster under *Montana*. If, and only if, appellants overcome the heavy presumption *Montana* establishes against the existence of tribal jurisdiction will a federal court have occasion to address the sovereign immunity issue at all.

Our judgment is guided by *Nevada v. Hicks*, 533 U.S. 353 (2001) decided by the Supreme Court after the district court's dismissal in the present case. The primary issue in *Hicks* was whether a tribal court possessed "jurisdiction to adjudicate the alleged tortious conduct of state wardens executing a search warrant for evidence of an off-reservation crime." *Id.* at 357. The Court concluded that the tribal court did not have jurisdiction, applying the two *Montana* principles of Indian law that we have already discussed: first, that "'[a]s to nonmembers . . . a tribe's adjudicative jurisdiction does not exceed its legislative jurisdiction,'" *id.* at 357-58 (quoting *Strate*, 520 U.S. at 453; and second, that "[w]here nonmembers are concerned, the 'exercise of tribal power beyond what is necessary to protect tribal self-government or to control internal relations is inconsistent with the dependent status of the tribes, and so cannot survive without express congressional delegation,'" *id.* at 359 (quoting *Montana*, 450 U.S. at 564) (emphasis removed). Although the Court did not answer the question of whether a tribe's adjudicative jurisdiction over nonmembers equals its regulatory jurisdiction, the Court made clear that without regulatory jurisdiction under *Montana*, a tribe is definitively without adjudicative jurisdiction. *Id.* at 358.

Hicks expressly acknowledges that *Montana* and sovereign immunity are distinct doctrines. Moreover, *Hicks* rejects the view that "immunity defenses should be considered in reviewing tribal court jurisdiction," *id.* at 373 (quotation omitted), and provides two reasons for this conclusion:

> The first is that it is not true. There is no authority whatever for the proposition that absolute—and qualified—immunity defenses pertain to the court's jurisdiction—much less to the tribe's *regulatory* jurisdiction, which is what is at issue here. (If they did pertain to the court's jurisdiction, they would presumably be nonwaivable. *Cf. Idaho v. Coeur d'Alene Tribe of Idaho*, 521 U.S. 261, 267 (1997)). And the second problem is, that without *first* determining whether the tribe has regulatory jurisdiction, it is impossible to know which "immunity defenses" the federal court is supposed to consider.

Id. at 373-74 (parallel citations omitted). *Hicks* thus stands for the proposition that *Montana* analysis should proceed before considering immunity defenses.[9] In sum, we conclude that the district court should have performed a *Montana* analysis before reaching the sovereign immunity question.

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9. In another telling passage, the Court in *Hicks* stressed the narrowness of its holding: "We do not say state officers cannot be regulated; we say they cannot be regulated in the performance of their law-enforcement duties. Action unrelated to that is potentially subject to tribal control depending on the outcome of *Montana* analysis." *Id.* at 373.

D

Although the district court did not conduct a proper analysis under *Montana*, we are nonetheless free to affirm the district court's dismissal on any grounds for which there is a record sufficient to permit conclusions of law, provided the litigants have had a fair opportunity to develop the record. *See Seibert v. Oklahoma ex rel. Univ. of Okla. Health Scis. Ctr.*, 867 F.2d 591, 597 (10th Cir. 1989). We decline to do so, however, and instead vacate the court's dismissal of appellants' claim against County and Health District defendants, and remand the matter for further proceedings. In addition to the fact that County and Health District defendants did not brief the *Montana* issues on appeal,[10] we have kept in mind the limited nature of our inquiry when assessing Rule 12(b)(6) motions to dismiss for failure to state a claim upon which relief may be granted. "The granting of a motion to dismiss must be cautiously studied, not only to effectuate the spirit of the liberal rules of pleading but also to protect the interests of justice." *Pelt v. Utah*, 104 F.3d 1534, 1540 (10th Cir. 1996) (quotation omitted).

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10. (*Cf.* County Appellees' Br. at 3 ("Because the District Court never ruled on the issue of subject matter jurisdiction with respect to San Juan County Appellees, it would be inappropriate for this Court to address that issue on this limited appeal."); Health District Appellees' Br. at 3 (stating that the sole issue on appeal was "[w]hether the district court erred in dismissing plaintiffs' claim seeking enforcement of the tribal court orders as against the Health District defendants on the grounds that the Health District defendants are immune from suit in the tribal court under the doctrine of sovereign immunity").)

Appellants' position has been that the district court relied on the wrong doctrine in dismissing its claims against County and Health District defendants. We do not intend to suggest an outcome on remand. However, as the Supreme Court has observed, "the existence and extent of a tribal court's jurisdiction will require a careful examination of tribal sovereignty, the extent to which that sovereignty has been altered, divested, or diminished, as well as a detailed study of relevant statutes, Executive Branch policy as embodied in treaties and elsewhere, and administrative or judicial decisions." *Nat'l Farmers*, 471 U.S. at 855-56 (footnote omitted).

IV

The district court's dismissal of appellants' claim against Ickes and Truck Insurance is **AFFIRMED.** Dismissal of appellants' claim against County and Health District defendants is **VACATED,** and the matter is **REMANDED** for further proceedings consistent with this opinion. All outstanding motions are **DENIED.**

APPENDIX B — MEMORANDUM DECISION AND ORDER OF THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF UTAH, CENTRAL DIVISION DATED AND FILED OCTOBER 30, 2000

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF UTAH
CENTRAL DIVISION

Case No. 2:00CV584K

DR. STEVEN MACARTHUR et al.,

Plaintiffs,

vs.

SAN JUAN COUNTY et al.,

Defendants.

MEMORANDUM DECISION AND ORDER

This matter is before the court on the San Juan County Defendants' (the "County Defendants") Motion to Dismiss Plaintiffs' Declaratory Judgment Claim with Prejudice Based on Sovereign Immunity, in which the San Juan Health Services District Defendants (the "Health District Defendants") have joined[1] and also on Plaintiffs' Cross-

1. The Health District Defendants joined in the motion to dismiss in their Memorandum in Opposition to Motion for Preliminary Injunction.

Motion for Summary Judgment on the same issue.[2] A hearing on these motions was held on October 5, 2000.[3] At the

2. The precise posture of these motions is that they arose in connection with Plaintiffs' motion for a temporary restraining order. Part of the relief requested in that motion was for this court to enforce the Orders entered by the Navajo Tribal Court, which were entered within the past year against most of the Defendants in the instant case. At the August 22, 2000 hearing on Plaintiffs' request for a temporary restraining order, the County Defendants and Health District Defendants notified the court that they believed that this court could not enforce the Tribal Court Orders against them because, among other reasons, they were immune from suit in the Tribal Court. All of the Defendants (including Truck/Farmer's Insurance Company and R. Dennis Ickes) also argued that the Tribal Court Orders are unenforceable for a variety of other reasons, including that the Tribal Court did not have subject matter jurisdiction over them, and the Orders are not entitled to full faith and credit, and that this court should not enforce the Tribal Court Orders under principles of comity. This court then requested briefing on these legal issues and set a hearing for October 5, 2000. Plaintiffs' motion for a temporary restraining order was denied, except that the Health District was ordered to suspend their collection efforts pertaining to any named Plaintiff. In an Order dated September 29, 2000, the October 5, 2000 hearing was limited solely to the County Defendants' and Health District Defendants' argument pertaining to immunity. The other Defendants' arguments pertaining to the alleged unenforceability of the Tribal Court will be addressed in the near future, as set forth at the end of this Memorandum Decision and Order.

3. At the hearing, Plaintiffs submitted the Affidavit of San Juan County Commissioner Mark Maryboy. The County Defendants and Health District Defendants objected based on their contention that the law firm of Suitter Axland represents Mr. Maryboy, and thus Plaintiffs's counsel should not have communicated with Mr. Maryboy

(Cont'd)

hearing, the County Defendants[4] were represented by Jesse C. Trentadue, the Health District Defendants[5] were represented by Carolyn Cox, and Plaintiffs were represented by Susan R. Schildmeyer. Before the hearing, the court considered carefully the memoranda relating to these motions, along with Plaintiffs' original motion for a temporary restraining order and the other materials submitted by the parties. Since taking the matter under advisement, the court has further considered the law and facts relating to these

(Cont'd)

directly. Plaintiffs' counsel claimed that Mr. Maryboy initiated the contact. On October 11, 2000, counsel for Plaintiffs filed the affidavit with the court, with a proper caption. In light of the court's ruling contained herein, the oral motions to strike the affidavit are moot.

4. The County Defendants include San Juan County; San Juan County Commissioners J. Tyron Lewis, Mark Maryboy, and Bill Redd; San Juan County Attorney Craig Halls; and San Juan County Administrator Richard Bailey. In the Complaint filed in the Tribal Court, these individual defendants were named in both their official and personal capacities, except for Mark Maryboy, who was named in his official capacity only.

5. The Health District Defendants include the San Juan Health Service District, Cleal Bradford, Roger Atcitty, John Lewis, John Housekeeper, Karen Adams, Patsy Shumway, Dr. James Redd, Dr. Lloyd Val Jones, Dr. Manfred Nelson, Marilee Bailey, Ora Lee Black, Gary Holliday, Lori Wallace, Carla Grimshaw, Gloria Yanito, Julie Bronson, and Laurie Schafer. In the Complaint filed in the Tribal Court, not all of the individual Health District Defendants were named. The individual Health District Defendants in the Tribal Court action—and thus the individuals to whom this Memorandum Decision and Order pertains—were Roger Atcitty, John Lewis, Karen Adams, Patsy Shumway, and Laurie Schafer. These individuals were named in both their official and personal capacities, except for Patsy Shumway, who was named in her official capacity only.

motions. Now being fully advised, the court renders the following Memorandum Decision and Order.

I. BACKGROUND

The issue before the court is whether the County Defendants and the Health District Defendants (sometimes collectively referred to as "Defendants") were immune from suit in the Navajo Tribal Court (the "Tribal Court"), thereby precluding this court from enforcing the Tribal Court Orders against them.

A. The Tribal Court Orders

The Tribal Court action pertained generally to the Health District's operation of the Montezuma Creek Clinic (the "Clinic"), which is located within the exterior boundaries of the Navajo Reservation.[6] The Clinic, and the land on which it is located, is owned by the State of Utah as part of the Utah Navajo Trust Fund. The Clinic serves members of the Navajo Nation and is operated by the Health District pursuant to a contract with Indian Health Services ("IHS").

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6. In their Tribal Court Complaint, the plaintiffs (who do not include all Plaintiffs in the instant case) alleged claims for (1) violation of their right to free speech, (2) violation of their right to assemble, (3) violation of their due process rights, (4) wrongful hiring, (5) defamation and tortious interference with contractual relations, (6) theft (of reputation), (7) violation of their equal protection rights, (8) intentional and negligent infliction of emotional distress, (8) breach of fiduciary duties, (9) misfeasance, and (10) malfeasance in office.

Appendix B

In the Tribal Court action, Defendants unsuccessfully argued that they were immune from suit. In ruling on the plaintiffs' application for a preliminary injunction, the Tribal Court found that Defendants had failed to show how a service district—a minor political subdivision—is an "arm of the state" with immunity under *Alden v. Maine*, 527 U.S. 706 (1999). *See* Findings, Opinion and Judgment at Preliminary Injunction at (unnumbered) 9, dated December 28, 1999, attached as Exhibit 5 in Defendants' Submission of Tribal Court Record. In addition, the Tribal Court found that Defendants had "failed to show how civil rights violations are given immunity when *Alden v. Maine* exempts those types of injuries from immunity. . . ." *Id.* The Tribal Court also found that Defendants had "[f]ailed to show how a minor political subdivisions [sic] [with] limited governmental authority exceeds that of the entire Navajo Nation sovereignty." *Id.* Based on these conclusions, among others, the Tribal Court entered a preliminary injunction on December 28, 1999, ordering Defendants to take several actions regarding the plaintiffs, such as reinstating them, paying lost income, expunging the charges against them, etc. *Id.* at (unnumbered) 20. In addition, the Tribal Court ordered that Defendants are prohibited from:

> (a) Elimination of emergency medical technician services and coverage within the territorial jurisdiction of the Navajo Nation in service to the local Navajo and other Native American population for or on behalf of the Montezuma Creek Clinic;
>
> (b) interfering with the lab services to the Montezuma Creek Clinic;

(c) interfering with the pharmaceutical services provided to the Montezuma Creek Clinic;

(d) interfering with any form of patient care, by among any other matter or things, billing IHS patients; and

(e) interfering or harassing Ms. Singer as the manager of the Montezuma Creek Clinic.

Id. at (unnumbered) 21. The Tribal Court further ordered Defendants "to assist the Clinic and the local Navajo Chapters and chapter government, by any means necessary including Navajo and Ute language announcements on Navajo Nation wide radio; letter, etc. to help diabetic IHS patients to return to the clinic for treatment, including informing them that as an IHS patient, they do not have to directly pay for their health care treatment at the Montezuma Creek Clinic." *Id.* at (unnumbered) 22.

Additionally, on March 1, 2000, the Tribal Court signed an Order Denying Defendants' Motion to Dissolve or Modify the Preliminary Injunction Order. Although the Health District's contract with IHS to operate the Clinic had expired on December 31, 1999 and was not renewed, the Tribal Court, in the March 1, 2000 Order, restated its previous prohibitions and mandates from its December 28, 1999 Order, added further directives to Defendants, and imposed a fine of $10,000 a day for each day that the Order was not "carried out in its entirety." *See Order Denying Defendants' Motion to Dissolve or Modify the Preliminary Injunction Order* at 16, attached as Exhibit 12 in Defendants' Submission of Tribal Court Record. The Tribal Court also ordered that

"every personal defendant and defendants[']counsel will pay $1,000 per day of the $10,000 daily fine from their own personal assets." *Id.*

II. DISCUSSION

A. The County Defendants' Arguments

The County Defendants claim that they were immune from suit in the Tribal Court under the doctrine of sovereign immunity, and consequently they have urged the court to dismiss Plaintiffs' claim for declaratory relief pertaining to enforcement of the Tribal Court Orders. The County Defendants assert that, "as an arm of the State of Utah, San Juan County and its elected officials and employees are immune from suit in Navajo Tribal Court." The County Defendants point out that the states, in joining the Union, did not surrender any of their sovereign immunity with respect to tribal governments. They also argue that persons or entities subject to tribal governance, including tribal courts, do not enjoy the due process and other rights and protections that are given to citizens under the United States Constitution. Thus, they claim that "Congress could not by treaty or statute permit tribal governments with dominion over state governments and/or their political subdivisions because to do so would be to deprive these entities of their constitutional rights." Because the Tribal Court's dominion, if any, over Defendants does not arise under the United States Constitution or the Acts of Congress, then the only source for such jurisdiction would be the Tribe's inherent sovereignty, which Defendants contend, does not reach the State of Utah or its political subdivisions or their officers and employees.

Accordingly, Defendants contend that the common law, as well as the Utah Governmental Immunity Act ("UGIA"), render them immune from suit in the Tribal Court. Additionally, they argue that, to the extent that governmental immunity is waived as to any political subdivision or its employees or officials, the UGIA expressly restricts lawsuits against political subdivisions and their officials and employees to district courts of the State of Utah. *See* Utah Code Ann. § 63-30-16(1) (Supp. 2000).

The County Defendants also argue that Craig Halls ("Mr. Halls"), as the elected County Attorney, is an officer of the state because he prosecutes public offenses on behalf of the State of Utah, represents the State of Utah in civil cases, and assists the State as required by the Utah Attorney General. *See* Utah Code Ann. § 17-18-1(2) (1999). Thus, they argue, Mr. Halls enjoys the sovereign immunity of the state and the Tribal Court's Orders are unenforceable against him. In addition, the County Defendants contend that the remaining County Defendants are immune because "counties as quasi municipal corporations partake under the common law of the sovereign immunity of the State, as an arm of the State" relying on *Shaw v. Salt Lake County*, 224 P.2d 1037 (Utah 1950). They also claim that common law immunity also exists for public officers and employees performing discretionary acts or carrying out official policy. *Ross v. Schackel*, 920 P.2d 1159, 1161-62. (Utah 1996).

B. The Health District Defendants' Arguments

The Health District Defendants have joined in the County Defendants' Motion to Dismiss, claiming that the Health

District and its officers and employees were similarly immune from suit in the Tribal Court based on the state's retention of sovereignty and the UGIA. The Health District Defendants rely on the fact that, under the UGIA, the Health District is deemed a "governmental entity." They claim that the Health District was created in 1988 as a special service district, which, it claims, clearly falls within both the "special improvement district" and "public corporation" language of the UGIA. Further, they argue that Utah courts have held that such districts constitute governmental entities that fall within the UGIA, relying on *Lyon v. Burton*, 5 P.3d 616, 612-23 (Utah 2000) (county fire district entitled to governmental immunity).

In addition, the Health District Defendants claim that they are immune because the UGIA provides immunity for the Health District's actions that involve the exercise of governmental functions. They point out that the UGIA specifically provides that a governmental entity is immune from suit for any injury that results from the operation of a hospital or health care facility.

The Health District Defendants also claim that the individual defendants who are employees of the Health District are entitled to immunity, unless the acts were undertaken with fraud and malice, which, they ostensibly contend, the acts were not. Finally, they claim that, even if immunity was waived, suit may only be brought in state district courts—not in tribal courts.

Appendix B

C. PLAINTIFFS' ARGUMENTS

Plaintiffs offer numerous arguments why Defendants were not immune from suit in the Tribal Court. They argue that, under *Alden v. Maine*, 527 U.S. 706 (1999), states have consented to be sued for constitutional and federal law violations. They also claim that the doctrine of claim preclusion precludes any rehashing of the immunity issue or the jurisdiction issue, arguing that this court should not "second guess" the Tribal Court.

Plaintiffs also argue that Defendants are not arms of the state and that the County and Health District have failed to address the Tenth Circuit's analysis of the "arm-of-the-state" doctrine. *See, e.g., Sturdevant v. Paulsen*, 218 F.3d 1160 (10th Cir. 2000) (setting forth and applying test to determine whether a State Board for Community Colleges and Occupational education was an arm of the state). Plaintiffs contend that the County and the District are not arms of the state "because they are not represented in this action by the Utah Attorney General's Office, their judgments are not paid by the State fisc and risk management office, [they can] sue and be sued, own and alienate land, and enter freely into contracts." Thus, Plaintiffs contend that, because the County and Health District are not arms of the state, they are not entitled to sovereign immunity.

Moreover, Plaintiffs claim that "immunity fails by the *Strate* analysis," referring to *Strate v. A-1 Contractors*, 520 U.S. 438 (1997), and contend that, under *Strate*, the Navajo Nation "retain[s] inherent sovereign power to exercise

some form of civil jurisdiction over non-Indians on their reservations, even on fee lands." Accordingly, they argue, "the immunity argument is irrelevant."

In sum, Plaintiffs claim that "[n]o authority exists for minor political subdivisions to override the Treaty and their congressional enactments," that "[n]o statutory authority exists for this Court to circumscribe the inherent powers of the Navajo Court," and that, "because a Treaty preserves them, this District Court has an affirmative obligation to enforce them." Plaintiffs also argue that, because the Tribal Court was protecting its own authority (from the bad faith conduct toward the court), there is no immunity for this set of wrongful acts.

Even if Defendants were immune, Plaintiffs claim that Defendants waived their immunity when they filed counterclaims and participated in the Tribal Court proceedings. Plaintiffs also argue that Mr. Halls did not raise immunity defense "with specificity," and thus he waived his immunity. Finally, they argue that, because Mr. Halls was acting outside his authority, he had no immunity.

D. ANALYSIS

This court has jurisdiction pursuant to 28 U.S.C. § 1331 to determine whether a tribal court has exceeded the limits of its jurisdiction. *Strate*, 520 U.S. at 448. When reviewing tribal court decisions on jurisdictional issues, district courts should review tribal courts' findings of fact for clear error

and conclusions of law *de novo*.[7] *Atkinson Trading Co., Inc. v. Shirley*, 210 F.3d 1247, 1250-51 (10th Cir. 2000); *see also Strate*, 520 U.S. at 449. The immunity issue addressed by this court is a purely legal issue, which is reviewed *de novo*.

Sovereign immunity is a common law doctrine that precludes litigation against an unconsenting government. *See, e.g., Montana v. Gilham*, 932 F. Supp. 1215, 1219 (D. Mont. 1996) (citing Restatement (Second) of Torts § 895B)), *aff'd.* 133 F.3d 1133 (9th Cir. 1997). This court is not aware of any published case that has addressed the issue of whether political subdivisions of a state are immune from suit in a tribal court. The most analogous published case involves the question of whether a *state* is immune from suit in tribal

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7. Typically, courts must follow a deferential exhaustion rule that gives examination of the jurisdictional question in the first instance to the tribal court system. *Strate*, 520 U.S. at 448-49 & n.7. Thus, a party can challenge in federal court a tribal court's assertion of jurisdiction only after that party has exhausted the remedies available in the tribal court system, unless an assertion of tribal jurisdiction is "motivated by a desire to harass or is conducted in bad faith, or where the action is patently violative of express jurisdictional prohibitions, or where exhaustion would be futile because of the lack of an adequate opportunity to challenge the court's jurisdiction. *Id.* n.7 (quotations and citation omitted); *Atkinson*, 210 F.3d at 1250. In the instant case, tribal exhaustion is not at issue because Plaintiffs—not Defendants—filed suit in this court, requesting, among other things, that this court enforce the Tribal Court Orders. In fact, the Tribal Court granted leave to seek enforcement of the Orders "as appropriate in any Utah or federal court where it will be enforce[d] pursuant to principles of comity and applicable law." Special Order in Aid to Satisfaction of Preliminary Injunction at (unnumbered) 2, attached as Exhibit 9 to Defendants' Submission of Tribal Court Record.

court. In *Montana v. Gilham*, 133 F.3d 1133 (9th Cir. 1997), the State of Montana brought a declaratory judgment action in federal court to determine the enforceability of a judgment entered against it in the Blackfeet Tribal Court.

The *Gilham* case arose out of a fatal automobile accident that occurred when a car driven by a tribal member struck a state highway sign. Montana asserted immunity as a defense, but the tribal court entered judgment in favor of the plaintiff, and the Tribal Court of Appeals affirmed. The district court determined that Montana was immune from suit in tribal court. *See* 932 F. Supp. 1215, 1224 (D. Mont. 1996). The Ninth Circuit affirmed, stating that "tribal courts historically did not possess and have not retained sovereign powers over States" and that [t]he power to subject other sovereigns to suit in tribal court was simply not a part of the tribe's inherent sovereignty." 133 F.3d at 1137-38. The Ninth Circuit noted that "[c]ourts will find that a State has waived its Eleventh Amendment immunity only where stated by the most express language or by such overwhelming implication from the text as [will] leave no room for any other reasonable construction." *Id.* at 1139 (internal quotations omitted). Because the language of Montana's Constitution did not meet that standard, the *Gilham* court found that Montana had not waived its immunity from suit in federal court, and that "[f]or similar reasons, Montana has not waived its immunity from suit in tribal court. Indeed, given the standard to find a waiver, the only reasonable construction of the [Montana Constitution] is that Montana has consented to suit only in its own state courts." *Id.*

Appendix B

In the instant case, this court agrees with the reasoning of the Ninth Circuit in *Gilham* that tribal courts historically did not possess and therefore have not retained sovereign powers over states. Therefore, absent a state's express waiver of immunity, a state cannot be sued in tribal court. In addition, as explained below, this court finds that the same reasoning applies to a state's political subdivisions. Consequently, political subdivisions of the State of Utah, as defined by Utah law are immune from suit in tribal courts because the State of Utah has not waived the common law immunity of its political subdivisions from suit in tribal courts.

The United States Supreme Court has made clear that "[t]he Constitution never would have been ratified if the States and their courts were to be stripped of their sovereign authority except as expressly provided by the Constitution itself." *Alden v. Maine*, 527 U.S. 706, 727 (1999) (quoting *Atascadero State Hosp. v. Scanlon*, 473 U.S. 234, 239 n.2 (1985)). The Supreme Court has repeatedly emphasized that point. For example, in *Monaco v. Mississippi*, 292 U.S. 313 (1933), the Court stated:

> "It is inherent in the nature of sovereignty not to be amenable to the suit of an individual without its consent. This is the general sense and the general practice of mankind; and the exemption, as one of the attributes of sovereignty, is not enjoyed by the government of every State in the Union. Unless, therefore, there is a surrender of this immunity in the plan of the convention it will remain with the States. . . ."

Id. at 324 (quoting The Federalists No. 81, p. 487).

The Court has also explained that "sovereign immunity derives not from the Eleventh Amendment but from the structure of the original Constitution itself."[8] *Alden v. Maine*, 527 U.S. 706, 728 (1999). Thus, because "the Eleventh Amendment confirmed rather than established sovereign immunity as a constitutional principal, it follows that that immunity's scope is demarcated not by the text of the Amendment alone but by fundamental postulates implicit in the constitutional design." *Id.* at 728-29. In other words, the Eleventh Amendment stands "not so much for what it says, but for the presupposition . . . which it confirms." *Blatchford v. Native Village of Noatak*, 501 U.S. 775, 779 (1991).

The Constitution's structure and history, and the interpretations of the Supreme Court, make clear that "the States' immunity from suit is a fundamental aspect of the sovereignty which the States enjoyed before the ratification of the Constitution, and which they retain today (either literally or by virtue of their admission into the Union upon an equal footing with the other States) except as altered by the plan of the Convention or certain constitutional Amendments." *Alden*, 527 U.S. at 713. Accordingly, there is a "presumption that no anomalous and unheard-of proceedings or suits were intended to be raised up by the Constitution—anomalous and unheard of when the constitution was adopted." *Alden*, 527 U.S. at 727 (quotations and citations omitted). Therefore, the Court has "looked to

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8. The Eleventh Amendment provides: "The judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by citizens of another state, or by citizens or subjects of any foreign state." U.S. Const. Amend. XI.

the history and experience, and the established order of things, rather than adhering to the mere letter of the Eleventh Amendment in determining the scope of the States' constitutional immunity from suit." *Id.*

States have impliedly consented to suit in the "plan of the convention." *See Blatchford*, 501 U.S. at 781. Under the "plan of convention" theory, states are deemed to have impliedly waived some of their sovereignty when they ratified the Constitution. *See Monaco*, 292 U.S. at 322-23. The theory recognizes that, in order for the constitutional system to function, a relationship of reciprocal rights and responsibilities was necessarily imposed upon the states when they joined the Union. The states ceded some aspects of their sovereign immunity to the federal government, but they did not relinquish their sovereign immunity as against entities other than the United States and sister states. *See Blatchford*, 501 U.S. at 781. As a result, a state's implicit waiver of sovereign immunity as to suits by the United States or "sister states" is predicated upon the "mutuality of concession" inherent in the formation of the Union.[9] *Id.*; *see also Alden*, 527 U.S. at 749 ("the immunity of one sovereign in the courts of another has often depended in part on comity or agreement.")

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9. In addition, states have consented to some suits pursuant to subsequent constitutional Amendments, such as the Fourteenth Amendment. For example, in adopting the Fourteenth Amendment, the people required the states to surrender a portion of the sovereignty that had been preserved to them by the original constitution, so that Congress may authorize private suits against nonconsenting states pursuant to its section 5 enforcement power. *See Alden*, 527 U.S. at 756.

However, the Supreme Court determined in *Blatchford v. Native Village of Noatak* that "there is no such mutuality with either foreign sovereigns or Indian Tribes." 501 U.S. at 782. The Court recognized that "[w]hat makes the States' surrender of immunity from suit by sister States plausible is the mutuality of that concession." *Id.* The *Blatchford* Court further explained that Indian tribes enjoy immunity against suits by States, as it would be absurd to suggest that the tribes surrendered immunity is a convention to which they were not even parties." *Id.* But, "if the convention could not surrender the tribes' immunity for the benefit of the States, we do not believe that it surrendered the States' immunity for the benefit of the tribes." *Id.*

Although the *Blatchford* Court was addressing a different question than that presented to this court, it stands to reason that, if states cannot be sued by Indian tribes in a state's own courts, then tribal members certainly cannot sue a state in tribal court. This is particularly true when tribal courts do not recognize the Constitutional protections that are guaranteed to citizens and entities of the United States. Consistent with Supreme Court precedent and the Ninth Circuit's analysis in *Gilham*, this court agrees that a state, unless it has consented to such a suit, cannot be sued in tribal court. While the State of Utah surrendered some of its common law immunity as a member of the United States—based upon a mutuality of concession—there is no indication whatsoever that the State of Utah ever waived its common law immunity to suit in tribal courts.

The question in the instant case, then, is whether Defendants possess the same immunity as the State of Utah.

In *Gilham*, the court looked to Montana's Constitution and state law to determine whether it had waived immunity from suit in tribal court. *See* 133 F.3d at 1139. This court also finds it appropriate to look to Utah state law to determine whether Defendants enjoy the same immunity as the State of Utah and also whether the State of Utah has waived the immunity of Defendants from suit in tribal court.

Utah law is clear that political subdivisions enjoy the same immunity possessed by the State of Utah. *See* Utah code Ann. § 60-30-2, -3. Political subdivisions are defined as "any county, city, town, school, . . . special improvement or taxing district, or other governmental subdivision or public corporation." *Id.* § 63-30-2(7). Governmental entities, which are defined as "the state and its political subdivisions as defined by this chapter," *id.* § 63-30-2(3), are, unless otherwise provided in the UGIA, "immune from suit for any injury which results from a governmental function, governmentally-owned hospital, nursing home, or other governmental health care facility . . . ." *Id.* § 63-30-3(1).[10]

A state may expressly waive its sovereign immunity through legislative enactments that intentionally relinquish the state's immunity. *See Edelman v. Jordan*, 415 U.S. 651,

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10. A "governmental function" means "any act, failure to act, operation, function, or undertaking of a governmental entity whether or not the act, failure to act, operation, function, or undertaking is characterized as governmental, proprietary, a core governmental function, unique to government, undertaken in a dual capacity, essential to or not essential to a government or governmental function, or could be performed by private enterprise or private persons." Utah Code Ann. § 63-30-2(4)(a).

673 (1974). The State of Utah has expressly waived its sovereign immunity—and also the immunity of its political subdivisions—regarding certain claims, such as contractual obligations, actions involving property, and certain negligence actions, to name a few. *See* Utah Code Ann. §§ 63-30-5, -6, -10. Accordingly, Utah has consented to be sued in its own courts for such claims. *Id.* § 63-30-16.

However, a state's waiver of immunity in its own courts is not a waiver of its Eleventh Amendment immunity in federal court. *Edelman*, 415 U.S. at 677 n.19 ("Whether [the State] permits such a suit to be brought against the State in its own courts is not determinative of whether [it] has relinquished its Eleventh Amendment immunity from suits in the federal courts."); *Pennhurst State School & Hosp. v. Halderman*, 465 U.S. 89, 99 (1984) ("A State's constitutional interest in immunity encompasses not merely whether it may be sued, but where it may be sued."). Accordingly, it is axiomatic that a state's waiver of immunity in its own courts is not a waiver of its sovereign immunity in tribal courts.

In the case at bar, there is nothing in the record or in the laws of the State of Utah to suggest that Utah has waived the sovereign immunity of its political subdivisions and thus consented to their being sued in tribal court. Unless sovereign immunity is waived, it is retained.

Further supporting the conclusion that Utah's political subdivisions are immune from suit in tribal courts is the fact that there has been no mutuality of concession with Indian tribes, as there was when the states surrendered some of their immunity to the federal government. Not only are tribes

generally immune from suit, absent their consent, *see Santa Clara Pueblo v. Martinez*, 436 U.S. 49 (1978), but subordinate economic organizations of a tribe are also clothed with tribal immunity. *See Dixon v. Picopa Constr. Co.*, 772 P.2d 1104, 1108 (Ariz. 1989) ("[T]he subordinate economic organization doctrine allows Indian tribes to conduct their economic affairs through subordinate governmental agencies without fear of an unintended waiver of immunity."); *White Mountain Apache Indian Tribe v. Shelley*, 480 P.2d 654, 656 (Ariz. 1971) (finding that absent waiver, subordinate economic organization of Indian tribe enjoyed same immunity from suit that tribe enjoyed); *Snowbird Constr. Co., Inc. v. United States*, 666 F. Supp. 1437, 1441 (D. Idaho 1987) ("The attributes of tribal sovereignty generally extend to a housing authority, established by a tribal council pursuant to its powers of self-government.").

It would be nonsensical—in the absence of any mutuality of concession—to conclude that a political subdivision of a state is subject to suit in a tribal court when subordinate tribal governmental agencies are immune from suit in state courts. Moreover, it would be a ludicrous result if tribal members could sue political subdivisions in tribal court for claims for which no other citizen of the entire country could sue. For example, in the Tribal Court action filed by some of the Plaintiffs in the instant case, the plaintiffs alleged a claim for defamation. No other citizen in the entire nation could successfully allege such a claim against Defendants because the UGIA retains Defendants' immunity for such claims. *See* Utah Code Ann. § 63-30-10-(2). There is simply no basis for finding that tribal members can sue political subdivisions of the State of Utah in tribal court when that option is not available to any other individual in the United States.

Plaintiffs' arguments, which are based largely on the Tribal Court's erroneous conclusions of law, fail to convince the court otherwise. First, Plaintiffs' reliance on *Alden v. Maine*, 527 U.S. 706 (1999) is misplaced. The *Alden* case involved a suit brought by state probation officers against the State of Maine for violations of overtime provisions of the Fair Labor Standards Act. The Court held that Congress could not subject a state to suit in a state court without its consent. *Id.* at 759-60. *Alden* would be applicable only if it pertained to Congress subjecting a state to suit in tribal court.

Plaintiffs, relying on the Tribal Court Orders, correctly argue that the *Alden* Court noted that "lesser entities" of states, such as municipal corporations that are not arms of the state, are not immune from suit under the Eleventh Amendment. *See id.* at 756. However, the issue in the instant case is not an Eleventh-Amendment issue, i.e., this court is not faced with a question of whether a political subdivision of a state can be sued in federal court or whether Congress can abrogate the immunity of such political subdivisions. Accordingly, *Alden*'s instruction on this issue is inapplicable to this case, and Plaintiffs' claim that Defendants' failed to even conduct an "arm of the state" analysis is groundless. *Alden* is relevant only to the extent that it provides a comprehensive history of sovereign immunity and the presuppositions behind the Eleventh Amendment.

Plaintiffs also argue that issue preclusion bars review of the Tribal Court's conclusions and that this court cannot second-guess the Tribal Court. However, as stated above, according to the United States Supreme Court, it is entirely

appropriate for this court to review the Tribal Court's legal conclusions regarding whether it had jurisdiction over the Defendants.

Plaintiffs' argument that *Strate v. A-1 Contractors*, 520 U.S. 438 (1997) compels the conclusion that "immunity" is irrelevant is also erroneous. The Court in *Strate* provided an analysis of circumstances in which a tribal court can exercise subject matter jurisdiction in a civil case over the activities of non-Indians on non-Indian land within a reservation. *See id.* at 439-41. Quite obviously, the *Strate* Court did not determine that its subject-matter-jurisdiction analysis would apply even to parties that were immune from suit.

In addition, Plaintiffs claim that "[n]o authority exists for minor political subdivisions to override the Treaty [presumably of 1868] and their congressional enactments." However, Plaintiffs have not provided any authority for the proposition that any treaty or congressional enactment abrogates a state's or its political subdivision's immunity. Plaintiffs also mistakenly claim that, because the Tribal Court was protecting its own authority (from the bad faith conduct toward the court), there is no immunity for this set of wrongful acts. There is simply no authority for such a proposition.

Even if Defendants were immune, Plaintiffs claim, that immunity was waived by filing a counterclaim in the Tribal Court. However, the Tenth Circuit has made clear that when a defendant continued to assert its immunity, the filing of a counterclaim did not destroy that immunity. *See Mescalero*

Apache Tribe v. New Mexico, 131 F.3d 1379 (10th Cir. 1997). In this case, the filing of a counterclaim similarly did not destroy immunity.

Regarding the individual County Defendants and Health District Defendants in the Tribal Court action, this court finds that they were also immune. The UGIA provides that:

> An employee may be joined in an action against a governmental entity in a representative capacity if the act or omission complained of is one for which the governmental entity may be liable, but no employee may be held personally liable for acts or omissions occurring during the performance of the employee's duties, within the scope of employment, or under color of authority, unless it is established that the employee acted or failed to act due to fraud or malice.

Utah Code Ann. § 63-30-4(4), In this case, neither of the governmental entities can be liable, and thus, the individuals cannot be liable in their official capacities.[11] Furthermore, because there is no finding of fraud or malice in the Tribal Court's Orders, the individuals cannot be liable in their individual capacities.[12]

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11. Plaintiffs argue that Mr. Halls waived his immunity defense by failing to raise it in the Tribal Court. The court finds no merit in this argument because there is clearly an immunity defense raised in Defendants' Answer in the Tribal Court.

12. Plaintiffs claim that "Mr. Hall[s] was not acting within his authority," but offer no support. Aside from Mr. Halls, Plaintiffs did not specifically address arguments related to the individual defendants, in either their official or individual capacities.

Appendix B

III. OTHER ISSUES IN THIS CASE

Pursuant to the court's instructions at the August 22, 2000 hearing on Plaintiffs' motion for a temporary restraining order, Defendant Truck Insurance Company has filed a "Brief Regarding Subject Matter Jurisdiction, Full Faith and Credit, Comity, and Exhaustion," which will be treated as a motion to dismiss Plaintiffs' declaratory judgment claim against Truck. Defendant R. Dennis Ickes has also filed a memorandum on the same issues, which will also be treated as a Motion to Dismiss Plaintiffs' declaratory judgment claim against him. Plaintiffs, on October 26, 2000, filed a "Memorandum of Facts and Law in Support of Plaintiffs' Summary Judgment Motion for Declaratory Judgment and Writ of Mandamus Orders and Rebuttal to the Defendants Counterclaims," which is presumably in response to Truck's and Ickes' briefs. The parties are hereby notified that a hearing will be held on these three motions on November 17, 2000 at 10:00 a.m. The hearing is scheduled for 90 minutes. Truck and Ickes may—but are not required to—file reply memoranda supporting their motions to dismiss and opposing Plaintiffs' summary judgment motion no later than November 10, 2000.

In addition, Plaintiffs recently filed a motion to stay the preliminary injunction proceedings, except for the portion pertaining to enforcement of the Tribal Court Orders. Plaintiffs also requested an expedited hearing. All Defendants, including Truck and Ickes, if they choose to respond, should do so no later than November 10, 2000. Plaintiffs may then file a reply brief no later than November 15, 2000. This motion will be addressed at the November 17, 2000 hearing.

Finally, the Defendants have informed the court that there are various other legal issues regarding why this court cannot grant the relief requested in Plaintiffs' preliminary injunction motion, which issues should be addressed prior to holding an evidentiary hearing on that motion. Depending on the result of Plaintiffs' motion to stay proceedings on the preliminary injunction motion, a briefing schedule regarding all other legal issues pertaining to the preliminary injunction motion will be set at the November 17, 2000 hearing.

IV. CONCLUSION

For the foregoing reasons and good cause appearing, it is hereby ORDERED that the County Defendants' Motion to Dismiss is GRANTED, and Plaintiffs' claim for declaratory judgment pertaining to enforcement of the Tribal Court Orders against the County Defendants is DISMISSED; the Health District's Motion to Dismiss is GRANTED, and Plaintiffs' claim for declaratory judgment pertaining to enforcement of the Tribal Court Orders against the Health District Defendants is DISMISSED; and Plaintiffs' Cross-Motion for Summary Judgment is DENIED. Plaintiffs' motion for a preliminary injunction[13] is DENIED to the extent that it requests enforcement of the Tribal Court Orders against Defendants.

However, because Plaintiffs have sought injunctive relieve regarding the Health District's billing practices (a claim separate from their request to enforce the Tribal

13. Plaintiffs' Application for a Temporary Restraining Order has been converted into a motion for a preliminary injunction.

Court Orders), the Health District remains enjoined from pursuing collection efforts against any named Plaintiff—as set forth in the Order dated September 5, 2000—until the court resolves this specific issue, either on motions or after an evidentiary hearing.

A hearing on the arguments of Defendants Truck and Ickes, pertaining to the enforceability of the Tribal Court Orders against them, is set for November 17, 2000 at 10:00 a.m., at which time, Plaintiffs' motion to stay the preliminary injunction proceedings will also be addressed, after briefing as set forth herein.

DATED this 30th day of October, 2000.

BY THE COURT

s/ Dale A. Kimball
Dale A. Kimball
United States District Judge

APPENDIX C — MEMORANDUM DECISION AND ORDER OF THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF UTAH, CENTRAL DIVISION DATED DECEMBER 12, 2000 AND FILED DECEMBER 13, 2000

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF UTAH
CENTRAL DIVISION

Case No. 2:00CV584K

DR. STEVEN MACARTHUR et al.,

Plaintiffs,

vs.

SAN JUAN COUNTY et al.,

Defendants.

MEMORANDUM DECISION AND ORDER

This matter is before the court on (1) the legal issues pertaining to whether the Tribal Court Orders should be enforced against Defendants Truck Insurance Company ("Truck") and R. Dennis Ickes ("Mr. Ickes"),[1] (2) Plaintiffs'

1. Specifically, there are four motions on these issues: (1) Truck's motion to dismiss Plaintiffs' declaratory judgment claim, (2) Mr. Ickes' motion to dismiss Plaintiffs' declaratory judgment claim, (3) Plaintiffs' Motion for Summary Judgment, and (Cont'd)

Motion for Reconsideration, and (3) Plaintiffs' Motion for Declaratory Judgment. A hearing on the legal issues pertaining to enforcement of the Tribal Order was held on November 17, 2000, and the remaining motions have been decided without oral argument. At the hearing, R. Dennis Ickes represented himself, Kyle Finch represented Truck Insurance Company ("Truck"), Kathleen M. Liuzzi represented the County Defendants, Carolyn Cox represented the Health District Defendants, and Susan R. Schildmeyer represented Plaintiffs. Before the hearing, the court considered carefully the memoranda relating to these motions and the other materials submitted by the parties. Since taking the matter under advisement, the court has further considered the law and facts relating to these motions, as well as the briefs that have been filed since the hearing. Now being fully advised, the court renders the following Memorandum Decision and Order.

(Cont'd)

(4) Plaintiffs' Amended Motion for Summary Judgment. Truck's opening brief is actually entitled "Memorandum Brief Regarding Subject Matter Jurisdiction, Full Faith and Credit, Comity, and Exhaustion." Mr. Ickes' brief is similarly captioned. In a previous Order, the court stated that it would treat these briefs as motions to dismiss Plaintiffs' declaratory judgment claim.

Appendix C

1. LEGAL ISSUES PERTAINING TO WHETHER THE TRIBAL COURT ORDERS ARE ENFORCEABLE AGAINST TRUCK OR MR. ICKES

A. Background

The background of this case in general has already been set forth in this court's Order dated October 30, 2000 ("October 30 Order"). The background set forth herein pertains specifically to Truck and Mr. Ickes' involvement in the Tribal Court action. The Complaint filed in the Tribal Court originally sought relief against San Juan County, the San Juan Health Services District, and various individuals. Along with their Complaint, Plaintiffs also filed an Application for Preliminary Injunctive and Temporary Relief, and the Tribal Court entered a temporary restraining order on the same date. Neither Truck nor Mr. Ickes was named as a party.

However, at the time in question, April 1999, there was in effect a Comprehensive Hospital Liability Policy issued by Truck, which, among other things, covered the Montezuma Creek Clinic, which was operated by the San Juan Health Services District ("Health District"). Consequently, Truck retained Mr. Ickes to represent the District and related defendants (the "Tribal Court Defendants") in the Tribal Court action. Because, there were coverage issues as to many of the claims brought by Plaintiffs in the Tribal Court proceedings, however, Mr. Ickes was retained solely to represent the interests of Truck's insureds. Mr. Ickes was not retained to, and has not, represented Truck at any time pertinent to this action.

Appendix C

Upon motion of the Tribal Court Defendants, the Tribal Court dissolved the Restraining Order on May 14, 1999, apparently based at least in part on Mr. Ickes' arguments regarding *Sampson v. Murray*, 415 U.S. 61 (1964). On that date, the Tribal Court also began a preliminary injunction hearing. On December 28, 1999, the Tribal Court issued a preliminary injunction, ordering the Tribal Court Defendants to take several actions, which are set forth in the court's October 30 Order. In addition, the Tribal Court found that the Tribal Court Defendants and their counsel, Mr. Ickes, had engaged in bad faith conduct toward the court. Although it is not entirely clear which of the findings of bad conduct pertain to Mr. Ickes, it appears that the Tribal Court found misrepresentations of fact and law, spoliation of evidence, submission of evidence at the end of the preliminary injunction hearing, failure to plead fraud with specificity in the Tribal Court Defendants' counterclaims, and other unspecified violations of the Navajo Nation Rules of Civil Procedure.

On January 18, 2000, the Tribal Court Defendants filed a Motion to Dissolve or Modify Findings, Opinion and Judgment at Preliminary Injunction, arguing that it must be dissolved for lack of due process to Defendants, among other things. On January 27, 2000, Plaintiffs filed a Motion to Supplement the Pleadings in the case, seeking to add Mr. Ickes and Farmer's Insurance Companies and Truck Insurance Companies (collectively referred to as "Truck") as defendants in the action. Plaintiffs asserted claims against them for obstruction of justice, misuse of judicial process, defamation, denial of due process, denial of equal protection, and endangerment of Navajo patients at the Clinic. Plaintiffs

claimed that Truck was responsible for Mr. Ickes' conduct through legal theories of agency. Plaintiffs requested that the Tribal Court order Mr. Ickes and Truck, jointly and severally, to pay $18,000,000 to Plaintiffs and $6.000,000 to the Clinic.

On February 23, 2000, the Tribal Court entered an Order granting Plaintiffs' Motion to Supplement the Pleadings. On March 1, 2000, the Tribal Court entered an Order denying the Tribal Court Defendants' Motion to Dissolve, again making references to their bad faith conduct in the proceedings. The Tribal Court also ordered that the Preliminary Injunction Order be carried out immediately, and no later than March 3, 2000, and imposed a fine of $10,000 a day for each day that the Order was not carried out in its entirety. In addition, the Tribal Court ordered that "every personal defendant and defendants[']counsel will pay $1,000 per day of the $10,000 daily fine from their own personal assets."

On March 6, 2000, the court entered a Special Order in Aid to Satisfaction of Preliminary Injunction, ordering, among other things, that the Tribal Court Defendants (presumably including Truck and Mr. Ickes) be restrained from alienating money or personal property until they paid the relief granted in the Preliminary Injunction Order and that they submit a listing of their assets to Plaintiffs. The court also stated that Plaintiffs could seek comity in the Utah and federal courts.

On March 15, 2000, Plaintiffs filed with the Tribal Court a Motion for All Defendants to be Bound by the Preliminary Injunction Order, seeking to bind the newly added defendants,

Truck and Mr. Ickes. On April 27, 2000, without notice or an opportunity to be heard, the Tribal Court entered an Order Mandating that All Defendants be Bound by the Preliminary Injunction Order. In that Order, the Tribal Court held that Mr. Ickes and Truck were bound in privity with the other defendants and that they had "responsibility for all legal liabilities incurred by the defendants as declared in the December 28 Preliminary Injunction Order."

On June 12, 2000, Truck filed a Motion to dismiss Plaintiffs' claims against it based on the fact that Mr. Ickes had been hired under a reservation of rights and was not acting as Truck's agent in the tribal proceeding and therefore Truck could not be held liable for any misconduct of Mr. Ickes and because, as a matter of policy, a party should not be allowed to sue an adverse party's attorney. After Plaintiffs failed to file a timely response, the Tribal Court entered an Order dismissing Truck, but without substantively ruling on Truck's motion. Apparently, the judge indicated that he would issue an Order clarifying whether the dismissal was with or without prejudice; however, he has not yet done so. Based upon conversations with the court clerk, Truck believes that the dismissal will be without prejudice, and Plaintiffs have again filed a motion in Tribal Court to join Truck as a Defendant in the proceedings and bind it to the Tribal Court's prior Orders.

B. Discussion

Both Truck and Mr. Ickes argue that the Tribal Court did not have jurisdiction over them, and thus, this court cannot enforce the Tribal Court Orders against them.[2] In addition, they argue that even if the Tribal Court did not have subject matter jurisdiction over them, this court should not, under principles of full faith and credit or comity, enforce the Tribal Court Orders. Among other arguments, Mr. Ickes also argues that, as an attorney, he was immune from suit. Plaintiffs, however, adamantly disagree with all of Truck's and Mr. Ickes' arguments.

As a preliminary matter, both Truck and Mr. Ickes argue that exhaustion does not apply in this case. First, it is not a jurisdictional prerequisite. *See Iowa Mutual Ins. Co. v. LaPlante*, 480 U.S. 9, 16 n.8 (1987). Thus, there are several exceptions to the requirement. For example, there are exceptions when the assertion of jurisdiction was motivated by a desire to harass or conducted in bad faith, where the action was patently violative of express jurisdictional prohibitions, or where exhaustion would be futile. *National Farmers*, 471 U.S. at 857 n.21. There is also an exception when the requirement would serve no purpose but for delay. *Strate v. A-1 Contractors*, 520 U.S. 438, 459 n.14 (1997). Similarly, the Ninth Circuit has found that exhaustion is not required when tribal court jurisdiction did not exist under

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2. Whether a tribal court has civil jurisdiction over a non-Indian defendant is a question that must be answered by reference to federal law and is therefore a federal question under 28 U.S.C. 1331. *See, e.g., National Farmers Union Insurance Cos. v. Crow Tribe of Indians*, 471 U.S. 845, 852 (1985).

Montana v. United States, 450 U.S. 544 (1981) and *Strate*, 520 U.S. at 459. *Burlington Northern R.R. Co. v. Red Wolf*, 196 F.3d 1059, 1065 (9th Cir.), *cert. denied*, __ U.S. __, 120 S. Ct. 1964 (2000); *see also Hornell Brewing Co. v. Rosebud Sioux Tribal Court*, 133 F.3d 1087, 1093 (8th Cir. 1998) (exhaustion not required where court clearly lacked jurisdiction because there was no on-reservation conduct by defendant).

In this case, the court has previously found that exhaustion is not required because Plaintiffs—not Defendants—brought this action in federal court, after the blessing of the Tribal Court judge. *See* October 30 Order at 9 n.7. In addition, the court finds that, because the Tribal Court clearly lacked jurisdiction over both Truck and Mr. Ickes, as discussed below, exhaustion is not necessary. Furthermore, the court finds that exhaustion would be futile and would serve no purpose but for delay.

1. Truck

a. Subject Matter Jurisdiction

It is well-established that a tribe's jurisdiction will not extend to non-Indian conduct beyond the reservation's borders. *See Hornell*, 133 F.3d at 1093. In the Tribal Court action, Truck had not engaged in any conduct within the boundaries of the Navajo Nation. The claims against Truck are based solely on the conduct of Mr. Ickes. However, Mr. Ickes was never an agent of Truck in the Tribal Court proceedings, and Mr. Ickes' conduct was therefore not the conduct of Truck. Truck did not retain control over Mr. Ickes,

and Plaintiffs have not pointed to any evidence to the contrary. In fact, because Truck was reserving its rights to deny coverage for a number of Plaintiffs' claims, and a conflict of interest existed between Truck and its insureds, Truck specifically advised both the Health District and Mr. Ickes, in a letter dated April 23, 1999, that Mr. Ickes was only to represent the Health District and that the hospital would control the defense. The letter stated that Mr. Ickes had no obligation to represent Farmers' interest in this matter. Thus, Truck did not engage in any on-reservation conduct, and consequently the Tribal Court did not have jurisdiction over Truck. Thus, the Tribal Court Orders are therefore not enforceable against Truck.

Even assuming, however, that Plaintiffs could establish an agency relationship between Truck and Mr. Ickes or that Truck otherwise engaged in on-reservation conduct, the Tribal Court still did not have subject matter jurisdiction over Truck. The seminal case on this issue is *Montana v. United States*, 450 U.S. 544 (1981). The *Montana* Court noted that the "exercise of tribal power beyond what is necessary to protect tribal self-government or to control internal relations is inconsistent with the dependent status of tribes, and so cannot survive without express congressional delegation." *Id.* at 563-64.

The *Montana* court set forth two exceptions that would permit tribes to exercise civil jurisdiction over nonmembers under limited circumstances: The first exception permits a tribe to "regulate, through taxation, licensing, or other means, the activities of nonmembers who enter consensual relationships with the tribe or its members, through

commercial dealings, contracts, leases, or other arrangements." *Id.* at 565. The second exception allows tribes to exercise inherent sovereign power over the conduct of non-Indians on a reservation when that conduct "threatens or has some direct effect on the political integrity, the economic security, or the health or welfare of the tribe." *Id.* at 566. The Supreme Court, however, has clarified that this second exception must be narrowly applied, explaining that "the exception applies when to hold otherwise would threaten "the right of reservation Indians to make their own laws and be ruled by them." *Strate*, 520 U.S. at 459.

Truck argues, and this court agrees, that neither exception applies in this case. Truck does not have any "consensual relationship" with the Tribe or any of the individual Plaintiffs, and therefore the first exception does not apply. In addition, the second exception does not apply because, as in *Strate*, regulatory or adjudicatory authority over the alleged tortious conduct by Truck against Plaintiffs (*i.e.*, Mr. Ickes' alleged bad faith conduct during the Tribal Court proceedings) is not needed to preserve the Navajo Nation's right to make its own laws and be ruled by them. As in *Strate*, jurisdiction is not necessary to protect tribal self-government and is not crucial to the political integrity, economic security or health or welfare of the Navajo Nation. Under Plaintiffs' analysis, the exception would swallow the rule because virtually every act that occurs on the reservation could be argued to have some political, economic, health or welfare ramification to the Tribe. *See County of Lewis v. Allen*, 163 F.3d 509, 514 (9th Cir. 1998) (narrowly construing the second *Montana* exception to find that tribal court lacked jurisdiction over tribal member's claim that county deputy sheriff had

committed a tort against Plaintiff while engaging in law enforcement activities on the reservation).

b. Full Faith and Credit and Comity

Truck argues that the Tribal Court Orders are not entitled to full faith and credit. In *Wilson v. Marchington*, 127 F.3d 805 (9th Cir. 1997), *cert. denied*, 523 U.S. 1074 (1998), the Ninth Circuit found that the Full Faith and Credit Clause of the Constitution applies only to the states and that there is nothing in the debates of the Constitutional Convention concerning this clause that indicates the framers thought the clause would apply to Indian tribes. *Id.* at 808. The *Wilson* court determined that whether a tribal court judgment was to be enforced should be considered solely as a matter of comity. This court agrees.

Truck also argues that the Orders should not be enforced against Truck as a matter of comity. The *Wilson* court set forth the proper test to apply when considering whether to enforce a tribal judgment as a matter of comity. The court found that, as a general principle, federal courts should recognize and enforce tribal judgments. *Id.* at 810. However, the court stated that federal courts must neither recognize nor enforce tribal judgments if the tribal court did not have both personal and subject matter jurisdiction or if the defendant was not afforded due process of law. *Id.*

In this case, Truck argues, and this court agrees, that the Tribal Court did not have subject matter jurisdiction and that Truck was not afforded the basic tenets of due process. Truck and Mr. Ickes were added as defendants and bound—after

the fact—by the Orders entered by the Tribal Court. The Tribal Court made findings about their conduct without any evidentiary hearing. Neither Truck nor Mr. Ickes was ever given an opportunity to defend against these new claims. Accordingly, this court will not enforce the Tribal Court Orders under principles of comity.

2. Mr. Ickes

a. Subject Matter Jurisdiction

Plaintiffs claim that the Tribal Court had jurisdiction over Mr. Ickes pursuant to the *Montana/Strate* analysis because, among other things, he entered into a consensual contract with the Tribe by contracting with the Navajo Court to be an officer of the court. This court rejects the argument that he entered into a consensual contract with the Tribe by becoming an officer of the Navajo Court. Moreover, the absence of any nexus between the allegations contained in the Complaint filed in Tribal Court and the alleged misconduct of Mr. Ickes also defeats Plaintiffs' argument. In addition, for the reasons set forth above pertaining to Truck, the court finds that the second *Montana/Strate* exception does not apply. Thus, the court finds that the Tribal Court did not have jurisdiction over Mr. Ickes, and it therefore will not enforce the Tribal Orders against him.

b. Full Faith and Credit and Comity

As stated above, this court finds that the Tribal Court did not have jurisdiction over Mr. Ickes, and, for the reasons set forth above pertaining to Truck, that Mr. Ickes was not

afforded the basic tenets of due process. Like Truck, Mr. Ickes was added as a Tribal Court Defendant and bound—after the fact—by the Orders entered by the Tribal Court.[3] The Tribal Court made findings about his conduct without any evidentiary hearing. Mr. Ickes was never given an opportunity to defend against these new claims. Accordingly, this court will not enforce the Tribal Court Orders under principles of comity.

c. Attorney Immunity

Mr. Ickes also argues that this court should not enforce the Tribal Court Orders because it is against the public policy of both Utah and the United States to hold an attorney liable to a non-client absent fraud, collusion or privity of contract. *Oxedine v. Overturf*, 973 P.2d 417, 421 (Utah 1999) (citing *National Sav. Bank v. Ward*, 100 U.S. 195, 205-06 (1880)); *see also Tappen v. Ager*, 599 F.2d 376, 378 (10th Cir. 1979); *Garcia v. Rodey, Dickason, Sloan, Akin & Robb*, 750 P.2d 118 (N.M. 1988). The Garcia court noted that appropriate means generally existed to redress grievances concerning the

3. Mr. Ickes cites numerous examples regarding the Tribal Court's due process violations. However, Plaintiffs dispute Mr. Ickes' characterization of the events in the Tribal Court that he contends deprived him of due process. Plaintiffs maintain that, if the court were to rely on such examples, it would be obligated to review the entire Tribal Court record. Rather than examining the entire record of the Tribal Court, the court relies solely on the fact that Mr. Ickes was added as a defendant and "bound" by the Tribal Orders without the opportunity to be heard. Thus, the Tribal Court necessarily made findings about his conduct based solely upon Plaintiffs' briefs and without any input from Mr. Ickes. This court will not enforce any order from any court that is made under such circumstances.

alleged misconduct of an adverse attorney, either within the action itself or by invoking disciplinary proceedings through the disciplinary board. *Id.* at 763.

This court agrees that Mr. Ickes could not be liable to Plaintiffs in the circumstances involved in the Tribal Court action.[4] Thus, this court will also not enforce the Tribal Orders entered against Mr. Ickes for this reason.[5]

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4. Mr. Ickes has also filed a Motion to Dismiss requesting that the court dismiss him as a Defendant in the case at bar. The court had previously granted Plaintiffs' request to hold this motion in abeyance until twenty days after the court's ruling on the Tribal Court issues. Given the court's ruling regarding Mr. Ickes, it is difficult to imagine any scenario under which Mr. Ickes would be an appropriate defendant in this action. However, before the court rules on Mr. Ickes' motion, Plaintiffs are invited to file a memorandum in opposition to Mr. Ickes' motion to dismiss if they believe that some legitimate basis still exists despite the court's ruling pertaining to Mr. Ickes. In addition, in the same memorandum, Plaintiffs should discuss whether Truck should be retained as a defendant in the instant case in light of the court's ruling herein. Such memorandum must be filed and served no later than January 9, 2001 and must be within the page limitations set forth in the local rules. Mr. Ickes and Truck may then file and serve a reply memorandum no later than January 22, 2001.

5. Of course, because this court finds that Mr. Ickes could not be liable to Plaintiffs in the Tribal Court action, and in light of Plaintiffs' argument that Truck's liability was based upon Mr. Ickes' conduct, an additional basis exists upon which the court finds that the Tribal Court Orders are not enforceable against Truck.

Appendix C

II. PLAINTIFFS' MOTION FOR RECONSIDERATION AND REQUEST FOR DECLARATORY JUDGMENT

Plaintiffs have moved for reconsideration of this court's Order dated October 30, 2000, relying on "new case law." Plaintiffs claim that on September 26, 2000, the Tenth Circuit issued a relevant decision in *NLRB v. Pueblo San Juan*, 228 F.3d 1195 (10th Cir. 2000). In addition, they point out that the First Circuit recently issued a decision in *Ninigret Dev't Corp. v. Narragansett Indian Wetuojuck Housing Auth.*, 207 F.3d 21 (1st Cir. 2000) (decided March 22, 2000). Plaintiffs, however, have failed to provide any legitimate ground for reconsideration.

Courts generally recognize three grounds for reconsideration: (1) an intervening change in controlling law; (2) availability of new evidence; and (3) the need to correct clear error or prevent manifest injustice. *Ekotek Site PRP Comm. v. Self*, 932 F. Supp. 1319 (D. Utah 1996). The two "new" cases on which Plaintiffs rely were decided prior to the court's October 5, 2000 hearing on the matter and prior to the court's October 30 Order. Thus, Plaintiffs could have timely argued the relevance of these cases, but failed to do so. Moreover, these cases are not contrary to the court's Order and thus are not intervening changes in controlling law. Finally, due to the court's own research, the court was aware of these two cases prior to issuing its Order. Thus, the court will not reconsider its Order based on these cases.

Plaintiffs also rehash several of the arguments made previously in the Plaintiffs' supporting briefs, and thus again have failed to provide a legitimate basis for reconsideration

of these arguments. However, even considering the merits of Plaintiffs' arguments, they all fail for the reasons set forth in the court's October 30 Order and in the Health District's Memorandum in Opposition to Plaintiffs' Motion for Reconsideration.

Finally, Plaintiffs have also filed a Motion for Declaratory Judgment and Amendment to the Plaintiffs' Motion for Reconsideration Due to the Unconstitutionality of the Utah Governmental Immunity Act ("UGIA"). It is unclear whether Plaintiffs' motion is directed at only Plaintiffs' claim seeking enforcement of the Tribal Court Orders or also at Plaintiffs' remaining claims in this action. The court has assumed that it pertains only to enforcement of the Tribal Court Orders. If Plaintiffs intended to file such a motion regarding any remaining claims, they may do so at a later date.

Again, Plaintiffs have not provided a basis for reconsideration, as they could have made such arguments prior to the court's Order. Addressing the merits of the argument, however, the court denies Plaintiffs' motion. The court, in its October 30 Order relied on the State of Utah's inherent immunity—not Governmental Immunity—in finding that the County and Health District Defendants were immune from suit in Tribal Court. The court relied on only one portion of the UGIA, Utah Code Ann. § 63-30-4(4), which pertains to the immunity of individual employees of the State. This provision has been found by a majority of the Utah Supreme Court to be constitutional. *See Lyon v. Burton*, 5 P.3d 616 (Utah 2000). Thus, the court denies Plaintiffs' motion.

Appendix C

IV. CONCLUSION

For the foregoing reasons and good cause appearing, it is hereby ORDERED that:

(1) What has been treated as Mr. Ickes' motion to dismiss Plaintiffs' declaratory judgment action against him (docket entry # 32) is GRANTED, and Plaintiffs' claim for declaratory judgment pertaining to enforcement of the Tribal Court Orders against Mr. Ickes is DISMISSED;

(2) What has been treated as Truck's motion to dismiss Plaintiffs' declaratory judgment action against it (docket entry # 31) is GRANTED, and Plaintiffs' claim for declaratory judgment pertaining to enforcement of the Tribal Court Orders against Truck is DISMISSED;

(3) Plaintiffs' Motion for a Temporary Restraining Order (docket entry # 5), which has been converted to a Preliminary Injunction Motion, is DENIED to the extent that it requests enforcement of the Tribal Court Orders against Mr. Ickes or Truck.

(4) Plaintiffs' Motions for Summary Judgment (docket entries # 77 and 82) are DENIED;

(5) Plaintiffs' Motion for Reconsideration (docket entry # 86) is DENIED;

(6) Plaintiffs' Motion for Declaratory Judgment and Amendment to the Plaintiffs' Motion for *Reconsid-*

eration Due to the Unconstitutionality of the Utah Governmental Immunity Act (docket entry # 103) is DENIED;

(7) Plaintiffs' Motion for Declaratory Judgment (docket entry #106) is DENIED;

(8) Plaintiffs may file and serve a memorandum in opposition to Mr. Ickes' motion to dismiss (docket entry # 18) no later than January 9, 2001. Plaintiff should address whether, in light of this court's ruling herein, there exists any basis for retaining Mr. Ickes as a Defendant in the instant case. Plaintiffs should also address whether Truck should be retained as a defendant in the instant case in light of the court's ruling herein. Such memorandum must be within the page limitations set forth in the local rules. Mr. Ickes and Truck may then file and serve a reply memorandum no later than January 22, 2001.

(9) Regarding Plaintiffs' Motion for Certification Under Rule 54(b) (docket entry # 84), no later than January 12, 2001, any party to this action may file a brief pertaining to whether this court should certify, under Rule 54(b), the instant Order and also the Order dated October 30, 2000. The court will then rule on that motion.

DATED this 12th day of December, 2000.

BY THE COURT:

s/ Dale A. Kimball
DALE A. KIMBALL
United States District Judge

APPENDIX D — FINDINGS, OPINION AND JUDGMENT AT PRELIMINARY INJUNCTION OF THE DISTRICT COURT OF THE NAVAJO NATION JUDICIAL DISTRICT OF SHIPROCK, NEW MEXICO DATED DECEMBER 28, 1999

THE DISTRICT COURT OF THE NAVAJO NATION
JUDICIAL DISTRICT OF SHIPROCK, NEW MEXICO

SR-CV-162-99-CV

DONNA SINGER; Fred Riggs C#13570;
Alison Dickson C#212,765;

Plaintiffs,

vs.

SAN JUAN COUNTY; San Juan Health Service District; Rick Bailey; Reid Wood; Lauren Schafer; Craig Halls; Commissioner Bill Redd; Roger Atcitty; Commissioner Mark Maryboy; John Lewis; Commissioner J. Tyron Lewis; Karen Adams; Patsy Shumway, and other John and Jane Does as yet unnamed in their personal and official capabilities,

Defendants.

FINDINGS, OPINION AND JUDGMENT
AT PRELIMINARY INJUNCTION

THE COURT, having jurisdiction over these parties and proceedings made out on a territorial premise, that is, the area in which the subject health care facility is located is within the territorial jurisdiction of the Navajo Nation, and

for further cause that two of the three plaintiffs are members of the Navajo Tribe of Indians, the third is married to an enrolled member, and they ALL have significant contact with the Navajo Nation, as does the clinic itself as a major health care provider to the Navajo and other local Native Americans who look to this Court for justice. Such contentions of jurisdiction are well founded by way of Montana v. United States, 450 U.S. 544 (1931) and the exception found in Strate, Associate Tribal Judge, Tribal Court of the Three Affiliated Tribes of the Fort Berthold Indian Reservation, et al, v. A-1 Contractors, U.S. Supreme Court, April 28, 1997, notwithstanding 7 NNC 253(B), and therefore, having now before it the above styled proceedings ripe for decision in the matter of the application of the plaintiffs for a preliminary injunction pursuant to Rule 65(c) of the Navajo Nation Rules of Civil Procedures, pending trial in chief in the matter of the initial complaint drawn by the plaintiffs against the defendants raising issues of:

denial of due process;

denial of equal protection;

denial of free speech and assembly;

defamation;

theft;

conspiracy;

and interference with the public policies of the Navajo Nation.

Despite the contentions of the defendants, the Court specifically finds all these claims raise issues clearly extending well beyond the mere loss of income or loss of a

job, directly into the wellbeing of the plaintiffs and Navajo Nation citizens and as argued by the plaintiffs, go to the soul of a person and their inalienable rights that exceeds monetary value. Likewise the plaintiffs also raise claims that the Native American, and in particular, Navajo patients of Montezuma Creek Clinic, have likewise been and are being harmed by the San Juan Health Services District conduct, by way of:

stopping emergency and routine ambulance and EMT service;

stopping laboratory services; and

billing of IHS patients creating the chilling result of effectively turning many patients, including diabetic patients, away from the Montezuma Creek Clinic for fear of their inability to pay for their care.

For raising such claims, the plaintiffs, as well as plaintiffs counsels, were labeled 'bold faced liars' by the defendants and likewise, San Juan Health Services District has totally disregarded the Navajo Nation's chapters' resolutions and the concerns for the Navajo patients' well being.

On initial application the Court issued a temporary restraining order on behalf of the plaintiffs in prelude to the proceedings in chief on injunctive relief. The TRO was dismissed on the motion of the defendants and the proceedings on the preliminary injunction commenced thereafter on testimony. Testimony was taken in sequential setting with written closing arguments received by the court on the 6th of December, 1999.

With the plaintiffs represented by Wm. P. Battles, Esq. of the firm of Wm. P. Battles and Associates of Window.

Rock, Navajo Nation, and Susan Schildmeyer, Esq., and the defendants by Dennis Ickes, Esq., all testimony and arguments are now fully before the Court, and well considered in their total, the Court draws attention to the issues of injunctive relief as found at Rule 65(c) of the Rules of Civil Procedure, stating:

That the moving parties, the plaintiffs herein; must demonstrate to the Court that they have a claim framed in a protectable right or interest and have a high likelihood of success on the merits; and,

That the plaintiffs then must further demonstrate that they are likely to suffer irreparable injury, loss, or damage to that protectable right or interest unless injunctive relief is issued; and,

That the likely injury, loss, or damage to the plaintiffs are substantial in nature and character; and finally,

That the plaintiffs do not have an otherwise available and adequate remedy at law.

The Court is mindful that the issuance of injunctive relief is clearly within the sound discretion of the trial court. Kenai Oil & Gas, Inc. v. Department of Interior, 671 F.2d 858, 866 (10th Cir. 1982).

Accordingly, the Court makes the following findings based on the testimony before it:

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That as to the matter of plaintiff Fred Riggs:

That Mr. Riggs is a Physicians Assistant and a permanent regular employee of the San Juan Health Services District at the Montezuma Creek Clinic; and, on or about the 11th day of November, 1998, Mr. Riggs was RIF and rehired with a $10,000.00 pay cut; was made to start using a time card; and lost three years of raises; including his raise for being a Navajo-English interpreter; and,

That the RIF was not done in compliance with the Navajo Preference in Employment Act (NPEA) in as much as there was no written justification as to just cause for the RIF; nor was a warning of the RIF made to Mr. Riggs; nor was Mr. Riggs RIF last, as a Navajo Physician Assistant; and, Prior to November of 1998 Mr. Riggs had 30 years of unblemished employment as a Physicians Assistant, and had not prior to November 1998 ever been required to have hourly time keeping responsibilities; and,

That in the second week of November, 1998, or thereabouts, on Mr. Riggs first ever time card, Mr. Riggs accidentally represented 8.4 hours as a day and a half, or 12 hours; and, That as a result of this time card mistake Mr. Riggs was disciplined from the 2nd day of December, 1998 to the 8th day of December 1998 by:

Being placed on administrative leave, and being told that he could not speak or associate with other clinic employees; and, being charged with fraud, in writing, and the same being placed in his personnel file as a disciplinary measure; and,

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Being placed on probation for the term of 30 days, creating fear from the loss of his employment; and, given further warnings that he may be terminated for repeating such time card errors; and, That Mr. Riggs never received any warning letters; any time card instruction; nor any time to correct any alleged deficiencies, either prior to this November RIF, or the aforestated discipline or probation; and,

That within less than 10 (ten) days of being charged with fraud and being placed on administrative leave, and subsequently probation, Mr. Riggs was offered a promotion to fill the position made vacant by Ms. Singers termination, as manager of the Montezuma Creek Clinic; and

That Mr. Riggs grieved his discipline as being discriminatory in a letter to Mr. Wood, and Mr. Wood nearly immediately withdrew the offered promotion because Mr. Riggs had accused him of discrimination; and,

That the personnel policies and procedure of the San Juan Health Services District prohibit punishment of employees who make discrimination grievances such as Mr. Riggs had done; and,

That Mr. Riggs has specialized medical training and has not been on hourly time card keeping requirements in the 30 years or so prior to November of 1998, and that as a bona fide professional, is exempt from time card keeping requirements; and,

That Mr. Reid Wood stated that time cards were a problem throughout the San Juan Health Service Districts payroll activities and had to be stopped; and,

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That after Mr. Riggs grievance hearing he was placed on an additional 30 days probation without justification; and,

That Rick Bailey found Reid Wood had falsely informed Bailey of the breadth of discipline meted out to Riggs, and Wood was never disciplined for telling his superior a falsehood; and,

That the spread sheet analysis of Bryan Bolander, and the time cards submitted to the Court show similar and multiple errors on the time cards throughout the San Juan Health Services District; and,

That particular time cards showed, for example, that even in the first week of November, 1998, just one week prior to Mr. Riggs being disciplined, Reid Woods time card had ink; cross outs; and write ins, errors for which others, notably the plaintiffs, were disciplined, however Reid Woods was not similarly disciplined for his time cards errors; and,

That a second example is the time cards of Bruce Bryant, a Caucasian physician assistant, had time cards showing he was not required to punch in or out, either before or after the November, 1998, RIF; and,

That a third noted example are the time cards of Mary Nielson, again showing ink; cross outs; and white outs, while Mr. Riggs and Ms. Singer were being severely disciplined for like infractions, no discipline was taken in respect to Ms. Nielson; and,

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The defendants offered absolutely no credible evidence of the San Juan Health Services District affording any evidence of Mr. Riggs receiving any due process; evidence of any degree of equal protection of the policies and procedures, as well as the law, applicable to his employment; no evidence of any consideration of the Navajo Preference in Employment Act in its actions towards Mr. Riggs; and no evidence that the San Juan Health Services District had not intentionally used the reputation of Mr. Riggs without his permission essentially to stop the time card problems throughout the San Juan Health Services District; and,

The defendants did not offer any evidence that the defendants had not administratively conspired to continue to use Mr. Riggs reputation and case as a means of arbitrarily; capriciously, and abusively making an example of what happens to people who take grievance of decisions of the San Juan Health Services District, and who make allegations of racial or other discrimination; and,

Testimony of Ms. Singer.

Ms. Singer was a permanent employee and manager of the Montezuma Creek Clinic; and,

Mrs. Singer had previously helped set up and manage the Blanding Urgent Care Center, and the Blanding Birthing Center; and,

That Ms. Singers career started as an x-ray technician working up to being the manager of three different health care clinics; and, that for some of Ms. Singers career as a clinic manager she did not have to punch in and out on time cards; and,

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That the San Juan Health Services District recognized managers as FSLA exempt as a matter of policy; and, Ms. Singer had three job assignments with the San Juan Health Services District (1) as an x-ray technician; (2) an Ultrasound technician; and (3) the Manager of the Montezuma Creek Clinic; and,

That Ms. Singer worked approximately 3000 hours off the clock without being paid overtime; and,

That Ms. Singer had a great deal of latitude in making management decisions since Montezuma Creek Clinic was so far from the Monticello, Utah, headquarters of the San Juan Health Services District and the District administrators seldom visited the Montezuma Creek Clinic; and,

That on the 13th day of November, 1998, Ms. Singer was unaware of another persons clocking in on her Montezuma Creek Clinic time card when she was in Blanding, Utah; and,

That Ms. Singer told the Chief Financial Officer of her whereabouts on the date in question; and,

That the purported time card error involved only four hours of work for which Ms. Singer was never paid, and Ms. Singer admitted to having made the time card error; and,

That Ms. Singer was charged with fraud; placed on administrative leave; told not to communicate with anyone at the clinic; and then terminated; and,

That Ms. Singer was not previously aware that Rick Bailey was the instigator of her termination until she received the

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Answer of the 14th of May, 1999, and suspected from the information therein provided that Mr. Bailey had authorized her termination; and,

That Rick Bailey testified that he felt uncomfortable being Ms. Singers grievance hearing officer because he had actually participated in the decision to terminate Ms. Singer, and he testified further that he relied on Craig Halls' advice to proceed as her grievance hearing officer anyway in spite of Utah Supreme Court law to the contrary and further Mr. Bailey and Mr. Wood concealed this information from Ms. Singer; and,

That Ms. Singers future in public health and in her small community where she resides has been harmed due to the adverse publicity of the malicious and unfounded fraud charges against her; and,

That Reid Wood likewise threatened Ms. Singer by telling her "she needed to remember who she worked for" after speaking out in public San Juan Health Services District board meetings; and,

That Rick Bailey told Ms. Singer that she was viewed as an "enemy to the hospital"; and,

Mark Maryboy, San Juan County Commissioner, testified that he was concerned that Ms. Singer be given due process and that all protocols be followed since he knew from previous experience that people who spoke out in respect to the San Juan Health Services District were viewed as troublemakers and dealt with by the San Juan Health Services District and San Juan County, accordingly; and,

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That as to the testimony of Bryan Bolander regarding Ms. Singer:

That Bryan Bolander is a Certified Public Accountant with a professional background in working with time cards and as per his testimony he found no pattern of fraud in Ms. Singers time cards; and,

That as per the testimony of Mr. Bolander Ms. Singer documented things such as places; or times; in detail, which he testified is not consistent with the commission of time card fraud; and,

That as testimony of Mr. Bolander Ms. Singer's time cards showed she worked on holidays; weekends; and whenever an emergency arose; and,

That Mr. Bolander testified that he attributed Ms. Singers time card errors to the fact that she was required to be clocking in and out at three different work places and had so many responsibilities; and,

That Bolander further testified that it was his professional experience that managers are not usually required to use time cards because of their FSLA exemption; managers were expected to carry out many heavy responsibilities; and managers were usually expected to work in excess of 40 hours per week; and,

That Ora Lee Black, a similarly experienced manager with San Juan Health Services District, testified that she could not complete all her job duties in forty hours despite the fact that she did not have three jobs nor was she required to be in three different locations in the San Juan Health Service District to perform her management duties; and,

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That likewise according to the time cards presented Mary Anderson, a caucasian manager of the Monument Valley Clinic, also within the San Juan Health Services District, was not obliged to punch in and out on time cards; and,

That Mr. Bolander testified that as per his spread sheet analysis the number and, types of errors commonly found by him to exist in the San Juan Health Services District that if everyone time cards were multiplied by three places of work and had to have documented time they would probably all look the same as Ms. Singer and Beverly Harris cards; and,

That as per Mr. Bolanders testimony, Beverly Harris time cards are worse than Singers and Ms. Harris was never disciplined; charged with fraud; or terminated; and,

That according to the further testimony of Ora Lee Black, caucasian, she testified that she had herself personally called into work to have someone clock in for her on numerous times, so numerous that Ms. Black when questioned could not recall how many times, and that to Ms. Black further knowledge that other nurses in Blanding, Utah, did likewise as a common practice, without being disciplined; charged with fraud; or terminated; and,

The defendants offered absolutely no credible no evidence of the San Juan Health Services District affording any evidence of Ms. Singer receiving any due process; evidence of any degree of equal protection of the policies and procedures, as well as the law, applicable to her employment; no evidence of any consideration of the Navajo Preference in Employment Act in its actions towards

Ms. Singer; and no evidence that the San Juan Health Services District had not intentionally used the reputation of Ms. Singer without her permission essentially to stop the time card problems throughout the San Juan Health Services District nor did the defendants offer any evidence that the defendants had not administratively conspired to continue to use Ms. Singers reputation and case as a means of arbitrarily; capriciously, and abusively making an example, even as to trial by the media of what happens to people who stand up for their rights and take grievance of decisions of the San Juan Health Services District, and who make allegations of racial or other discrimination; and take any position in opposition to the San Juan Health Services District or the defendants themselves; and,

That as to the matter of Allison Dickson status of employment:

That Mr. Dickson started working for the San Juan Health Services District as a full time temporary fill-in in March of 1998 and in November of 1998 applied for full time employment status; and,

That Mr. Dickson time cards and W-2 show that Mr. Dickson worked some 700 hours after his temporary fill-in position had expired; and,

That the policies and procedures of the San Juan Health Services District states that after an employee has worked for the total of 520 hours they will be made to be regular employees of the San Juan Health Services; and,

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That the defendants acknowledge that Mr. Dickson formally requested in writing to Mary Nielson on the 11th day of December, 1998, that he be given regular employment status; and,

That Mr. Dickson signed an affidavit attesting to the highly racially inflammatory and insensitive comment of Reid Wood concerning Certificates of Degree of Indian Blood being equated with 'dog tags"; and,

That the time cards entered into evidence demonstrates the current Montezuma Creek Clinic manager's nephew is working full time as a regular status employee and working for more hours than Mr. Dickson with less time in seniority; and,

That finally, the records of the San Juan Health Services District show that there is no other employee of the San Juan Health Services District with Mr. Dickson's time in service measure by regular work hours that is not a regular permanent employee with benefits of regular status employment.

Defendants' Evidence is completely Admitted

Commensurate with Navajo Nation Customs and Traditions that highly value fairness and everyone having their say, the Court allowed into the record all of the defendants' exhibits as follows:

All of Ms. Singer's time cards and payroll records, and the time cards of all other persons in the employ of the San Juan Health Services District, and a spreadsheet drafted by CPA

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Bolander explaining the patterns of mistakes and errors were admitted on behalf of the defendants.

a. The time cards show that errors were rampant throughout the San Juan Health Services District system and were not at all limited to just the time cards of the plaintiffs Mr. Riggs and Ms. Singer; and,

That three of the time cards of Ms. Singer were never given to either Singer at the time of her termination, nor used in any evaluation of Ms. Singers termination, nor provided to the counsels for the plaintiff despite appropriate discovery being timely requested; and,

b. That on the hearing of the 14th day of May, 1999, Mr. Bolander testified that the three time cards shown to him were not part of the cards he was previously provided with to examine either by the San Juan Health Services District or provided to plaintiffs counsels; and

A letter from Lauren Shafer critical of Ms. Singer was likewise accepted, and notably had a "check mark" in the upper right corner signifying it was not kept in Singer's ordinary personnel file, but a secret file in the CEO's office.

a. Lauren Schafer, a chief administrator with the San Juan Health Services District never rebutted in her testimony where the letter was kept; and,

b. That despite the inflammatory nature of the letter it was never placed in Ms. Singer's appropriate personnel file, nor did the prior Chief Executive Officer apparently

consider the letter when Ms. Singer was given regular merit pay raises and additional duties and expanding management responsibilities; and,

c. The Court accordingly views the letter with substantial lack of importance; and,

That Lauren Schafer testified that after a "scrupulous examination" of Singer's records for over nine months, Ms. Schafer had not discovered one piece of evidence as to Ms. Singer's intent to commit fraud.

Ms. Singer testified that she never remembered doing anything to intentionally cheat the San Juan Health Services District or San Juan County out of anything; nor does any evidence presented otherwise indicate anything to the contrary; and,

Ms. Singer testified that she never remembered ever calling anyone to clock in for her on any occasion; nor does any credible evidence presented otherwise indicate anything to the contrary; and,

Contrary to the assertions of the defendants, Mr. Bolander testified that Ms. Singer's cards show that:

Ms. Singer documented where she was at on a consistent basis; and,

That Mr. Bolander could find no evidence whatsoever of fraud; and,

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That Mr. Bolander's spreadsheet analysis, along with a multitude of time cards in comparison, illustrated plainly that time card errors were and are a problem in the district, and not at all limited to only Mr. Riggs and Ms. Singer; and,

That the defendants have all failed to submit even one piece of evidence rebutting the expert testimony of Mr. Bolander, or his analysis, or his well-reasoned and documented findings which rely exclusively on the evidence which was in the possession of the defendants and tendered by the defendants to the Court as discussed in the foregoing.

LEGAL CONCLUSIONS AND FINDINGS

At first glance, and without the benefit of testimony, these proceedings appeared to have been framed solely as a labor-employment issue. Closer examination and scrutiny of the testimony before the Court it is not nearly so simply the case herein, especially in light of the sworn testimony. Discrimination never is obvious or simple. It is most commonly found in subtle subterfuge manifesting deceit and contempt for the human condition to which each of us are differently born, and for which, without the benefit of those strong enough to come forward through the feigned veil of petty righteousness and resulting humiliation, it can only be endured in the silent pain of accepting disgrace and indifference. It is always a sad sad moment in the condition of mankind. No exception is found here.

With minor adaptation from the arguments delivered to the Court, the Court has largely adopted the position of the plaintiffs to the legal reasoning of these proceedings. Wherein the premise of the case before the Court is multi-faceted – framed in the original complaint, and now seeking parallel

injunctive relief. Rule 65 of the Navajo Rules of Civil Procedure provides for the preservation and consequence of evidence and testimony, and further sets forth the legal basis for an injunction which lays in Navajo case law, and focuses to proving four criteria for an injunction.

Case Law

The case law of the Navajo Nation provides that an injunction is extraordinary relief that is granted when an injury is unquantifiable and when there is no adequate remedy at law. Gudac v. Marianto, 1 Nav. R. 385, Nav. App. Feb. 28, 1978. The United States Supreme Court has likewise found that while economic loss alone generally does not constitute irreparable injury, "cases may arise in which the circumstances surrounding an employee's discharge, together with the resultant effect on the employee, may be so far departed from the normal situation that irreparable injury might be found." Sampson v. Murray, 415 U.S. 61, 92 n. 68 (1974). Notably, and contrary to the contentions of the defendants, the factual circumstances of Sampson are well seen to be nearly wholly unlike the factual circumstances here, but as so stated. Here, now having taken evidence and testimony, and on the examination of the Court, we have instead permanent employees or employees who qualify for regular employee status. Sampson involved a temporary employee with no vested interest in her employment. Sampson also had the availability of a completely impartial hearing panel. Here, it is noted from the testimony that such an impartial hearing panel was tainted in bias and deceit. The plaintiffs did not have the availability of such an impartial panel. Further, and unlike Sampson that concerned

only employee matters, these plaintiffs produced testimonial evidence and documentary evidence to support their claims of violation of civil and personal rights which are protected by the Navajo Nation Bill of Rights, notwithstanding the 1968 Indian Civil Rights Act, and as well the San Juan Health Services District's endangerment of the Native American and Navajo public that SJHSD did commercially and voluntarily within their corporate powers contract to provide services to.

As in the case of Halona v. Navajo Nation, 1 Nav. R. 189, the key to this case lies "not in non-Indian analysis." as to any matter of standing. Id. at 199. The fact that makes this case most distinguishable from Sampson in terms of the need for protection of the plaintiffs, is that the plaintiffs have a privilege and a duty under Navajo custom and tradition for Mrs. Singer in her tribal in-law status and Mr. Riggs and Mr. Dickson in their enrolled status, to look out for the welfare of their fellow Navajo "citizens". In Halona, this Tribal status raises issues "peculiar to Navajo tradition and law." The Navajo clan system, applicable to in-laws through their spouses, demonstrates the unique bonding of Navajo's to other Tribal members or non-tribal members as family, and the familial duties inherent to care for other members of the Tribal family as demonstrated by the plaintiffs in this case and by the common nature of Navajo custom and tradition, and not dissimilar from the familial duties as found among other tribes that remain likewise in their nearest to original condition in respect to their customs and traditions.

Further, and while not controlling it is at least instructive, that the Tenth Circuit has established the following four criteria for a preliminary injunction, not dissimilar to the requirements at Navajo law:

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The movant must establish that the injunction would not be adverse to public interest; and,

That the threatened injury to the movant outweighs whatever damage the proposed injunction may cause the opposing party; and,

That the movant will suffer irreparable injury unless the injunction issues; and,

That there is a substantial likelihood that the movant will eventually prevail.

Accordingly:

The Preliminary Injunction will not

Be Adverse to the Public Interest

In this case, a preliminary injunction will insure the protection of overwhelming public interest by way of the restoration and preservation of patients' welfare in the northeastern sector of the Navajo Nation; restoration of the clinic operations of the Montezuma Creek Clinic that are sensitive to Navajo needs; customs; and economic levels; and eliminating nepotism and favoritism in employment; thereby improving adherence to the provisions, terms, and conditions of the Navajo Preference in Employment Act; and reducing the chilling effect on the people's rights as is so well evidenced here. The injunction will further support and sustain the local Chapters resolutions.

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Patient Welfare

On November 9, 1999, the Court was given a letter from Nettie Pratt, the Montezuma Creek Clinic's diabetic clinician, indicating that there had been as much as a 250% drop in visits by diabetic patients alone to the Montezuma Creek Clinic, and many of those patients have now not been seen for three months or more. The reason these patients have not been coming in for life critical medical care is due to San Juan Health Service District's billing of IHS eligible patients, making them believe they must pay for medical services before receiving medical attention. Even one more month without effective management and adhering to compliance in stopping the billing, may lead to death, or serious irreversible eye or kidney damage to the patients, or other complications for the diabetic patients. Likewise in a similar vein, Debbie Benally, an Emergency Medical Technician for the Montezuma Creek Clinic, testified that when the ambulances were "locked down", Mrs. Singer, and plaintiffs attorneys, were the only one who cared, who called, and who tried to get something done about it despite the sneers and jeers of the defendants.

Smooth Clinic Operations

Brenda Brown, the current manager of the Montezuma Creek Clinic testified on September 24, 1999, that on numerous occasions the administration has refused to give even her the financial reports for the clinic that would have enabled her to do her job or otherwise effectively assist in the appropriate day to day management and operation of the Montezuma Creek Clinic especially in light of the now upcoming transition to local tribal control.

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Limiting Nepotism

Nepotism, likewise contrary to the personnel policies and procedures of the San Juan Health Services District as per the testimony received, is rampant at Montezuma Creek Clinic in that, for example, the manager is the sister of the Chairman of the Board, and likewise San Juan Health Services District, also by testimony, employs the current managers aunt, cousin, and nephew all working at the same clinic despite policy otherwise.

NPEA Adherence

Testimony likewise reflected that employment positions throughout the San Juan Health Services District have not been advertised either "in house" to existing San Juan Health Services District employees or in the Navajo Times or KTNN Radio as required by the Navajo Preference in Employment Act. As a matter of the public policy of the Navajo Nation labor is regulated to a certain extent including the provisions of the Navajo Preference in Employment Act - which compels a competitive process for employment which does not exclude Navajos, and other particular persons, and creates a qualified preference pool of Navajo labor whenever possible in that economic development and employment of the surplus Navajo work force are of significant public interest to the Navajo Nation and applicable whenever possible.

Little or No Damage to The Opposing Party

The defendants have confessed at the hearing of these proceedings on the 9th of November, 1999, that the Montezuma Creek Clinic will be removed from the control

and supervision of the San Juan Health Services District beginning the 1st day of January, 2000, in part at least due to the impact of this litigation. The defendants therefore argue that if the injunction issues now; it will only have effect for one month. The plaintiffs offer that even if for only a short time, that time is still crucial to the clinic's existence.

The defendants can not complain of damage due to large sums of back pay if the defendants could have cut the time very short by telling the truth on May 14, 1999. "Justice delayed is injustice" and "(N)o party can claim prejudice if the ability to prepare or raise claims was within his or her control, as here." Plummer v. Plummer, A-CV-30-89 at page 182.

Plaintiffs will Suffer Irreparable Injury if the Injunction Does Not Issue

If the injunction does not issue, people will consider the charges and actions against the plaintiffs to be true, and they will continue to suffer the irreparable harm to their names and reputations as attested to by the testimony of Pauline Oshley, George Jones and Debby Benally. These witnesses testified as to the harm to the Clinic, and to the plaintiffs, in specificity; (a) stoppage of ambulance services; (b) interference with pharmaceutical services; (c) stoppage of lab services; (d) harm to the reputations of Mr. Riggs and Ms. Singer; (e) and violations of rights of association of the plaintiffs.

There will be a chilling effect upon the rights of all Navajo citizens in the work place if they do not believe there can be redress against their employers for rights violations

in the workplace. San Juan County Commissioner Mark Maryboy testified that San Juan County has a deliberate pattern of not treating the Navajo people equally; violating the rights of Navajo and other Native American employees, and retaliation and discrimination against Navajo and other Native Americans that has continued for generations.

The harm has been irreparable. Ms. Singer testified that the scarcity of her personal resources, and the length of time the defendants have stalled these proceedings by obstructive tactics and false statements to the Court, has necessitated her to become separated from her husband in order for the family to financially survive. One can not quantify and compensate for the total disruption of a marriage and home done simply at the folly of her oppressors.

Mr. Riggs attested that his uncle, a veteran of the United States Armed Forces, died for these rights and freedoms for all Americans, and that can never be adequately compensated for by money or by the law. How does the Court or defendants compensate for the loss of rights bought with Navajo blood? It can't. Still, an injunction will begin the process of healing and the removal of the indignation of the phony fraud charge that still maliciously clouds Mr. Riggs' and Ms. Singer's name.

Pauline Oshley testified as to the "shabby" treatment the manager's family has been giving to her, and her small children. How is a young Brenda Brown, as Montezuma Creek Clinic manager, supposed to give orders or reprimands to her elder Aunt, Dorothy Kay, and stay in keeping with Navajo tradition and the family interrelationship of "Ke"?

Likewise, the plaintiff's legal fees and costs continue to escalate rapidly. One way irreparable injuries may be partially compensated for is by the payment of accrued legal fees and costs, and all expenses necessary for the plaintiffs to defend their rights as the Court will order herein.

There is Substantial likelihood the Movants Will Succeed on the Merits

The plaintiffs stand more than an excellent prospect of success of prevailing on the merits in these proceeding given the presentation and testimony to date. Pursuant to the FSLA, the time cards are irrelevant as a reason for disciplining or terminating Ms. Singer and Mr. Riggs. Even speaking in the opposite even if Singer's fraud charge (which has been found to be not true by this Court) were taken as possibly true, that does not excuse the denial of due process and equal protection as evidenced herein.

Defendants have produced no well-founded or substantial evidence to rebut the plaintiffs claims of rights deprivation; and, the defendants have placed at risk numerous patients by billing policies they are using to continue to turn away otherwise eligible Native Americans from vital medical and emergency care at the Montezuma Creek Clinic, in violation of IHS contracts and regulations not to even mention elementary common human dignity for their fellow man.

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Patterns of Bad Faith Toward the Court

Bad faith conduct towards the Court, and all the surrounding circumstances as are found to be true and appropriate in the sound discretion of this Court, can likewise be grounds for the plaintiffs to prevail. Herein, the Court sees as obvious the harm to the public and plaintiffs' rights and the waste of judicial processes in this Court by the plaintiffs repeated misrepresentations of fact and law; spoliation of evidence; witness intimidation and tampering; obstructing testimony; sandbagging of evidence; and repeated and substantive violations of the Navajo Nation Rules of Civil Procedure.

Misrepresentation of facts and law in violation of NNRCP at Rule 11. On May 14, 1999, defendants called the plaintiffs 'bold faced liars' as to activities at the Clinic, injuries to the Native American patients of the Clinic, and misrepresented Sampson v. Murray, upon which the Court relied to discharge its TRO. If minimal research had been done by the defense, and the truth had been told, and which Navajo Nation case law depended upon, the TRO could have easily been simply replaced by the Preliminary Injunction on May 14, 1999, with no further deprivations to the plaintiffs of rights, time, money, embarrassment and loss of reputation by a trial by tabloid conjured by the defendants. Further, numerous diabetic patients would not have continued to go without treatment for a life threatening disease.

Spoliation of evidence. Evidence submitted with the time cards of the Districts time cards shows, Richard Bailey's time card, that was viewed by plaintiffs Counsel and Bryan

Bolander, is missing. This card showed Bailey represented he worked 80 hours with a hand written '80' on a card he signed when he was working full time for San Juan County as the County Administrator, and as well claimed full time employment in the same time period with the San Juan Health Services District. Mr. Bailey was never disciplined for working in one place full time while he was employed full time at another and drawing full compensation from both positions at the same time.

Witness Intimidation. Debbie Benally testified she had never spoken with Mr. Wood prior to the day before her testimony, at which time he warned her over the telephone in the evening hours just before her anticipated testimony, as he did Ms. Singer personally, "you need to remember who you work for".

Ora Lee Black in her testimony stated the reason she did not wish to testify on Singer's behalf, or submit her affidavit which she declared to be true in all respects.

Ora Lee Black testified that she and the other nurses had been told "not to get involved" in the case by Reid Wood, after submitting their affidavits in support of Ms. Singer in respect to her position as manager of the Montezuma Creek Clinic.

Surprise and Prejudicial Evidence. Nearly all of the defendants' evidence was submitted to the Court, despite prior discovery applications as provided for in the Navajo Nation Rules of Civil Procedure, in the last hour or so of a 19 hour hearing, without notification or review by plaintiffs'

counsel prior to its presentation in the September 24, 1999, hearing.

Rule Violations. The defendants' have accumulated and advanced a substantial and impressive list of substantive rule violations under the Navajo Nation Rules of Civil Procedure which remain currently before the Court in various summary motions. The defendants, for example, plead fraud, without one piece of evidence as to Singer's intent to commit fraud, and without the specificity of pleadings as required by the Navajo Nation Rules of Civil Procedure at Rule 9. Despite this, local and international newspaper coverage published the ill-plead claim since it was in the May 14, 1999, 'Answer' of the defendants. The defendants have purposefully subjected Ms. Singer; Mr. Riggs; and Mr. Dickson, to a trial by tabloid.

All of the above enumerated actions of the defendants and defendants' counsel, have here constituted a pattern of behavior that only magnifies and exemplifies past and continued deprivations of the plaintiffs' inalienable rights, be they tribal or federal in nature, and harm to Native American patients and community in the Montezuma Creek area of the Utah Strip. As like in Gudac, such actions demonstrate the arrogance of the defendants, their cultural insensitivity, and the contempt and disdain in which they hold this Court; the Navajo Nation judicial system; and Native Americans in general.

Damages such as deprivation of rights; discrimination; denial of due process; infringements on freedom of speech; denial of dignity; and impunity of a person's reputation are

all deprivations that far exceed mere deprivation of money, or employment or embarrassment. These constitute "direct action .... potent with circumstances ... irretrievable." Adams v. Vance, 570 F.2d 950, 953 (1978). No amount of money, no availability of any Order of the Court, can fully compensate the plaintiffs and the Native American population in the Montezuma Creek for these past and ongoing substantial and inestimable damages.

While not controlling in the Navajo Nation Court as a matter of law it is at least instructive that this Court look to our sister sovereign through its Tenth Circuit and see that when the United States of America finds that when the three requirements of injury, ongoing harm, and more potential harm to the plaintiffs outweighs the harm to the defendants, then the plaintiffs need "only show that they have raised questions going to the merits so serious, substantial, difficult and doubtful, as to make them a fair ground for litigation and thus for more deliberate investigation", Tri-State Generation and Transmission Association, Inc. v. Shoshone River Power, Inc., 805 F.2d 351, 358 (10th Cir. 1986). Here, to date, facts show, that not only are three elements satisfied, but overwhelmingly, it is also the case that the fourth prong has been met.

The Navajo Preference in Employment Act defines the rights of employees in the work place of the Navajo Nation. The Navajo Preference in Employment Act has been violated by lack of clear warnings; lack of a fair hearing process; retaliation for grieving discriminatory acts; and lack of willingness to eliminate the problems. If the Navajo Preference in Employment Act has been violated, it is

presumptive that the Native American employee's rights have been violated and Navajo Nation public policy has been undermined and disregarded for naught.

Chilling Effect

Resultantly if injunction does not issue herein the public, Native American and non-Native American alike, will believe erroneously that nothing can be done when the San Juan Health Services District, or when any other entity; organization; group; or individual violates their rights, and such an assumption will have a chilling effect upon others who may wish to come forward with similar claims, and suppress such efforts to the detriment of all Native Americans and non-Native Americans alike. Such is not the foundation of a free society, and shall not be commenced here.

Conclusion

The defendants have, compared:

Failed to show how a service district, a minor political subdivision, is an "arm of the state" with immunity under Alden, et al v. Maine, __U.S. __, Docket No. N8-436, when Alden exempts minor political subdivisions from immunity; and,

Failed to show how civil rights violations are given immunity, when Alden v. Maine exempts those types of injuries from immunity, and Alden did not address Navajo civil rights as defined within Navajo custom and traditions; and,

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Failed to show how a special service district not implementing a merit system within the Utah Special District Personnel Management Act as "is established" by the Utah legislature, can be an "arm of the state" if it is violating the laws of the State within which it seeks to obtain immunity; and,

Failed to show how a minor political subdivisions limited governmental authority exceeds that of the entire Navajo Nation sovereignty, particularly when the injury sustained by the plaintiffs so specifically directly effects the health and welfare of the Navajo Nation chapters and their residents pursuant to the Montana exception of Strait v. A-1 Contractors; and,

Failed to show how a minor political subdivision of a State can benefit itself and the taxpayers of the district by voluntarily seeking out and entering into contracts with Navajo citizens, within the Navajo Nation boundaries, and then treat the Navajo Nation's customs and traditions; Bill of Rights; the Navajo Preference in Employment Act; the Utah merit system requirements, and HIS contract obligations, all with impunity, and believe that the district is somehow now immune from claims injury; and further,

Failed to show, or raise any issue or defense, as to the transcription records of the proceedings herein being unavailable by their inaudibility, despite the order of the Court the 9th of November, 1999, to notify the Court of any problem, and therefore the Court finds that the parties have waived any such issue or defense thereto; and,

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Accordingly, as set forth fully in the foregoing, injunctive relief is overwhelmingly justified and shall issue immediately. It is clear and convincing to the Court that the plaintiffs have (1) demonstrated to the Court that they have a claim framed in a protectable right or interest and have a high likelihood of success on the merits; (2) that are likely to suffer irreparable injury, loss, or damage to that protectable right or interest unless injunctive relief is issued; (3) that the likely injury, loss or damage to the plaintiffs are substantial in nature and character, and (4) that the plaintiffs do not have an otherwise available and adequate remedy at law. These protectable rights include denial of due process; denial of equal protection; denial of free speech and assembly; defamation; theft; conspiracy; and interference with the public policies of the Navajo Nation.

IT IS THEREFORE ORDERED, ADJUDGED and DECREED:

That the defendants be and are hereby ordered to immediately reinstate Ms. Singer and Mr. Riggs to their previous positions of employment as was occurring on the 1st day of November, 1998; and,

That the defendants be and are hereby ordered to immediately tender to Mr. Dickson full time status as an employee of the Montezuma Creek Clinic and that he be paid all commensurate back pay and benefits as may be due to him from the occasion of being eligible for such status; and,

That the defendants be and are hereby ordered to immediately pay all lost income from whichever source derived within the District, including but not limited to full

back pay and compensation as well as back benefits to the plaintiffs, including but not limited to retirement benefits and, other compensations regularly received by the plaintiffs with all such compensations to be credited and/or paid immediately; and,

That the defendants be and are hereby ordered to delete and expunge all the charges and writings pertaining to the December 2nd through the December 8th 1998 charges of fraud, discipline, and termination, from Mr. Riggs and Ms. Singer's personnel file, with a letter so stating the expungement to the plaintiffs and to this Court; and,

That the defendants be and are hereby ordered to not put Ms. Singer, and other like managers, and Mr. Riggs, and other like Physicians Assistants, on hourly time card keeping requirements for the purposes of salary and compensations or otherwise; and,

That Ms. Singer be returned to her role and position as a technician for and on behalf of the San Juan Health Services District; and,

That the defendants be and are hereby ordered to not interfere with clinic operations or move any clinic personnel; and,

That the defendants be and are hereby ordered to issue full payment of attorney's fees, costs, and expenses associated with these proceedings to date to be paid by cashier's check within five working days of the issuance of the injunction and to be paid not later than the 31st day of December, 1999, by and through the Registry of this Court; and,

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The Court orders a waiver of any security deposit due to (a) the limited financial circumstances of Ms. Singer, Mr. Dickson, and Mr. Riggs and (b) SJHSD's placing of Montezuma Creek Clinic employees in jeopardy as the transition from state to local tribal management nears; and,

The Court order that the defendants be and are hereby prohibited from: Eliminating Emergency Medical Technician services and coverage within the territorial jurisdiction of the Navajo Nation in service to the local Navajo and other Native American population for or on behalf of the Montezuma Creek Clinic; and,

Interfering with the laboratory services to the Montezuma Creek Clinic; and,

Interfering with the pharmaceutical services provided to the Montezuma Creek Clinic, and immediate payment of all current and past due billings; and,

Interfering with any form of patient care, by, among any other matter or things, billing INS patients; and,

Interfering or harassing Ms. Singer as the manager of the Montezuma Creek Clinic; and,

The Court further hereby Orders the defendants to assist the Montezuma Creek Clinic and the local Navajo Chapters, and chapter governments, by any means necessary, including Navajo and Ute language announcements on Navajo Nation wide radio; letters, etc. to help diabetic INS patients to return to the clinic for treatment, including informing such Native

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American patients that as an INS patient they do not have to directly pay for their health care treatment at the Montezuma Creek Clinic; and,

The Court further Orders that the plaintiffs report any such interference, harassment, or intimidation of Montezuma Creek Clinic operations, patients, and employees immediately to this Court; and,

The proceedings in chief herein be and are hereby scheduled for initial pretrial conference by this court, unless these proceedings are not earlier settled and compromised by the parties by stipulation on the limited factual; legal; and damage issues remaining.

So Signed and Ordered this 28 day of December 1999, at 2:45 PM.

s/ Raymond A. Begaye
The Honorable Raymond A. Begaye
District Trial Judge of the Navajo Nation

APPENDIX E — ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT DENYING PETITION FOR REHEARING DATED AND FILED NOVEMBER 8, 2002

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

No. 01-4001

STEVEN MACARTHUR, et al.,

Plaintiffs - Appellants,

v.

SAN JUAN COUNTY, et al.,

Defendants - Appellees.

ORDER

Filed November 8, 2002

Before **EBEL**, **McKAY**, and **LUCERO**, Circuit Judges.

Appellants' petition for a panel rehearing and appellees' petition for rehearing en banc are denied.

The petition for rehearing en banc was transmitted to all of the judges of the court who are in regular active service. As no member of the panel and no judge in regular active service on the court requested that the court be polled, that petition is also denied.

Appendix E

Entered for the Court
PATRICK FISHER, Clerk of Court
by: s/ [illegible]
Deputy Clerk

Supreme Court, U.S.
FILED
MAR 28 2003
CLERK

No. 02-1253

In The Supreme Court of the United States

FRED RIGGS, DONNA SINGER and AL DICKSON,

Petitioners,

v.

SAN JUAN COUNTY, SAN JUAN HEALTH SERVICES DISTRICT, County Commissioner J. TYRON LEWIS, County Commissioner LYN STEVENS (official capacity only), Commissioner MANUAL MORGAN (official capacity only), RICK BAILEY, County Attorney CRAIG HALLS, REID WOOD, KAREN ADAMS, ROGER ATCITTY, PATSY SHUMWAY (official capacity only), JOHN LEWIS, LAUREN SCHAFER, TRUCK INSURANCE EXCHANGE and ATTORNEY DENNIS ICKES, and as yet unnamed JOHN and JANE DOES, in their official and individual capacities, jointly and severally,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Tenth Circuit

BRIEF IN OPPOSITION OF RESPONDENTS SAN JUAN HEALTH SERVICES DISTRICT, ROGER ATCITTY, KAREN ADAMS, PATSY SHUMWAY, JOHN LEWIS, REID WOOD AND LAUREN SCHAFER TO PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether the court of appeals erred in (i) affirming the district court's dismissal of petitioners' claim to enforce certain orders of the Navajo tribal court as against respondents Truck Insurance Exchange and Dennis Ickes and (ii) remanding petitioners' claim as against the Health District and San Juan County respondents for an analysis of subject matter jurisdiction pursuant to *Montana v. United States,* 450 U.S. 544 (1981)?

PARTIES TO THE PROCEEDINGS

Petitioners

Petitioners Fred Riggs, Donna Singer and Al Dickson are plaintiffs below and plaintiffs in the action before the Navajo tribal court.

Respondents

Respondents San Juan Health Services District, Reid Wood, Karen Adams, Roger Atcitty, Patsy Shumway, John Lewis and Lauren Schafer (collectively "respondents" or Health District respondents") are defendants below and defendants in the action before the Navajo tribal court.

Additional Parties in this Court

San Juan County, J. Tyron Lewis, Lyn Stevens, Manuel Morgan, Bill Redd, Rick Bailey, Craig Halls (collectively "San Juan County respondents"), Truck Insurance Exchange ("Truck Insurance") and Dennis Ickes are additional respondents, defendants below, and defendants in the action before the Navajo tribal court.

Additional Parties Below

Dr. Steven MacArthur, Michele Lyman, Helen Valdez, Candace Laws, Paul Kieth, Dorothy Kieth, Baxter Benally, Melvin Capitan, Candace Holiday, Percy Mitchell, Eva Pleasant, Amy Terlaak and Linda Cacapardo were additional plaintiffs below, but were not parties in the action before the Navajo tribal court.

PARTIES TO THE PROCEEDINGS – Continued

Cleal Bradford, John Housekeeper, Gary Holliday, Dr. James Redd, Dr. Val Jones, Dr. Manfred Nelson, Marilee Bailey, Ora Lee Black, Laurie Wallace, Carla Grimshaw, Gloria Yanito and Julie Bronson were additional defendants below, but were not parties in the action before the Navajo tribal court.

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OPINIONS BELOW

The December 28, 1999 preliminary injunction entered by the District Court of the Navajo Nation, Judicial District of Shiprock, New Mexico, is reprinted in the appendix to the petition for a writ of certiorari ("P. App.") at 70a-104a. The Navajo tribal court entered three additional orders in furtherance of the December 28, 1999 preliminary injunction. These orders, dated March 1, 2000, March 2, 2000 and March 15, 2000, are reprinted in the appendix hereto ("R. App.") at 1a-20a, 21a-22a and 23a-25a, respectively. In the action below, petitioners sought enforcement of these orders entered by the Navajo tribal court.

The October 30, 2000 decision of the United States District Court for the District of Utah, Central Division, is unreported and is reprinted at P. App. 26a-51a. The October 30, 2000 order dismissed petitioner's claim seeking enforcement of the Navajo tribal court preliminary injunction with respect to respondents San Juan County, San Juan Health Services District, J. Tryon Lewis, Lyn Stevens, Manual Morgan, Rick Bailey, Craig Halls, Reid Wood, Karen Adams, Roger Atcitty, Patsy Shumway, John Lewis and Lauren Schafer. The December 12, 2000 decision of the District Court is unreported and is reprinted at P. App. 52a-69a. Pursuant to the December 12, 2000 order, the District Court dismissed the claim seeking enforcement of the tribal court preliminary order with respect to respondents Dennis Ickes and Truck Insurance.

The October 7, 2002 decision of the United States Court of Appeals for the Tenth Circuit is reported at 309 F.3d 1216, and is reprinted at P. App. 1a-25a. On November 8, 2002, the court of appeals denied a petition for panel

rehearing submitted by petitioners as well as a petition for rehearing en banc submitted by the respondents. The Order denying the petitions is reprinted at P. App. 105a-106a.

BASIS FOR JURISDICTION

The decision of the court of appeals was entered on October 7, 2002, and the court of appeals denied the petitions for panel rehearing and rehearing en banc on November 8, 2002. Petitioners Riggs, Singer and Dickson filed the petition for a writ of certiorari in the United States Supreme Court on February 6, 2003.

In reliance on Supreme Court Rule 15.3, this Brief in Opposition to the petition for a writ of certiorari is filed within thirty days from February 26, 2003, the date on which the petition was placed on the docket.

The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS, TREATIES, STATUTES, REGULATIONS AND ORDINANCES

Respondents do not believe that the constitutional provisions, treaties, statutes, or other authorities identified by petitioners as involved in this case are relevant to the question of whether the court of appeals erred in (i) affirming the district court's dismissal of petitioners' claim to enforce certain orders of the Navajo tribal court as against respondents Truck Insurance and Dennis Ickes and (ii) remanding petitioners' claim as against the Health

District and San Juan County respondents for an analysis of subject matter jurisdiction pursuant to *Montana v. United States*, 450 U.S. 544 (1981).

STATEMENT OF THE CASE

The Health District is a special service district organized by respondent San Juan County pursuant to Utah Code Ann. § 17A-2-1204. The individual Health District respondents are employees of the Health District or members of its board of trustees. The individual San Juan County respondents are County officials or employees of San Juan County.

The Health District operates a hospital in Monticello, Utah, as well as several out-patient clinics. Prior to January 1, 2000, the Health District operated an outpatient clinic located in Montezuma Creek, Utah. The Montezuma Creek Clinic is located within the exterior boundary of the Navajo Reservation on fee land held in trust by the State of Utah as part of the Utah Navajo Trust Fund. P. App. at 3a. The Health District provided medical services at the Clinic to Native Americans residing on the Navajo reservation pursuant to a contract with Indian Health Services, a federal government agency. Petitioners Fred Riggs, Donna Singer and Al Dickson were employed by the Health District at its Montezuma Creek Clinic. *Id.* In approximately November 1998, the Health District terminated Singer's employment, while Riggs and Dickson remained employed by the Health District at the

Montezuma Creek Clinic until January 1, 2000, when the Health District ceased operating the clinic.[1]

In April 1999, petitioners filed a Complaint for Damages in the Navajo tribal court. P. App. at 3a. While petitioners assert that they alleged violations of Navajo law in tribal court, Petition at 8-9, the Complaint in fact asserted a broad array of claims against the Health District and San Juan County respondents, including federal civil rights claims, state law tort claims and claims based upon the Navajo Preference in Employment Act.[2] P. App. at 4a, n.2. Riggs' and Dickson's claims arose generally out of their employment relationship with the Health District, while Singer's claims arose primarily from the Health District's termination of her employment.

Respondents asserted both sovereign immunity and lack of jurisdiction as defenses to the Navajo tribal court Complaint. P. App. at 30a. Nevertheless, on December 28, 1999, the Navajo tribal court issued a preliminary injunction in which it ordered the Health District to reinstate petitioner Singer to her previous position and awarded back pay and attorneys' fees (an amount petitioners claimed was in excess of $500,000) to each of the petitioners. *Id.* at 101a-104a. Despite the fact that the Health District owned and operated the Montezuma Creek Clinic,

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[1] Since January 1, 2000, the Montezuma Creek Clinic has been owned and operated by Utah Navajo Health Systems, Inc. ("UNHS"), an entity of which Singer is the executive director. Singer, Riggs and Dickson have all been employed by UNHS at the Montezuma Creek Clinic since January 1, 2000.

[2] Respondents dispute petitioners' assertion that they are subject to the Navajo Preference in Employment Act. Petition at 8-9.

the preliminary injunction order also purported to preclude respondents from "interfering" with the management of and numerous services provided at the Clinic and directed respondents to take certain affirmative steps with respect to its operation of the Health District. *Id.* at 102a-104a. Moreover, although in their Complaint petitioners sought relief only with respect to the employment actions allegedly taken against them by the Health District, the Navajo tribal court provided broad relief to members of the Navajo Tribe in general, including prohibiting the Health District from billing Navajo Tribe members for health care services, regardless of whether the services were provided at the Montezuma Creek Clinic or at Health District facilities off the reservation. *Id.* at 103a. The order also precluded the Health District from eliminating emergency and other services on the reservation. *Id.*

In March 2000, the tribal court entered several orders supplementing the preliminary injunction, including the Order Denying Defendants' Motion to Dissolve or Modify the Preliminary Injunction Order dated March 1, 2000, R. App. at 1a; the Special Order in Aid to Satisfaction of Preliminary Injunction dated March 2, 2000, *id.* at 21a; and the Order Mandating that All Defendants' [sic] Be Bound by the Preliminary Injunction Order. *Id.* at 23a. Pursuant to these orders, the Navajo tribal court ordered respondents immediately to pay back wages and attorneys' fees, *id.* at 16a-17a; imposed a $10,000 per day penalty upon respondents in the event they failed to comply immediately with the Navajo tribal court's orders, $1,000 of which was to be paid by the individual respondents, *id.*

at 20a; and ordered that the penalty would apply during any period of appeal. *Id.*[3] The tribal court also purported to grant petitioners leave to seek immediate enforcement of its orders in any Utah or federal court. *Id.* at 22a. Finally, the Navajo tribal court permitted petitioners to add as defendants Truck Insurance, the Health District's insurer, and Dennis Ickes, counsel for the Health District and San Juan County respondents in Navajo tribal court, and the tribal court bound both of them to its previously-entered orders. *Id.* at 24a-25a.

In August 2000, petitioners filed this action in the United States District Court for the District of Utah seeking to enforce the Navajo tribal court orders discussed above.[4] Shortly after the institution of this action, respondents moved to dismiss petitioners' claims to enforce the Navajo tribal court orders based on their sovereign immunity from suit in tribal court. By Order dated October 30, 2000, the district court dismissed petitioners' enforcement claim with respect to the Health District and San Juan County respondents. P. App. at 26a. According to the district court, as political subdivisions of the State of Utah and their officials or employees, the Health District and

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[3] Petitioners mislead this Court by asserting that the tribal court "threatened" to impose a penalty of $10,000 per day against respondents. Petition at 9. In fact, the tribal court did impose the penalty and, as noted, ordered that $1,000 per day of the penalty should be paid personally by the individual respondents. R. App. at 20a.

[4] In addition to the enforcement claim asserted by petitioners, the district court action named as plaintiffs a number of individuals other than petitioners. These additional plaintiffs asserted a broad range of federal civil rights and other claims against respondents as well as other defendants. The claims of these additional plaintiffs are not at issue before the Court.

San Juan County respondents shared in the State's sovereign immunity from suit in the Navajo tribal court. *Id.* at 43a. On December 13, 2000, the district court entered an order dismissing the enforcement claim as against Truck Insurance and Ickes on the grounds the tribal court lacked subject matter jurisdiction over them. *Id.* at 52a.

Thereafter, petitioners sought and obtained certification of the October 30 and December 13, 2000 orders pursuant to Fed. R. Civ. P. 54(b). On appeal, the court of appeals reversed the district court's ruling with respect to the Health District and San Juan County respondents. *MacArthur v. San Juan County*, 309 F.3d 1216 (10th Cir. 2002); P. App. at 2a. While the court of appeals acknowledged that cross-petitioners may have been entitled to sovereign immunity from suit in the Navajo tribal court, it found that the district court should have addressed the issue of the tribal court's subject matter jurisdiction under *Montana v. United States*, 450 U.S. 544 (1981), prior to addressing cross-petitioners' claim of sovereign immunity:

> The threshold question in our review of the Navajo court judgment is whether the Navajo Nation's decision to exercise adjudicative power over County and Health District defendants passes muster under *Montana*. If, and only if, appellants overcome the heavy presumption *Montana* establishes against the existence of tribal jurisdiction will a federal court have occasion to address the sovereign immunity issue at all.

Id. at 1226; P. App. at 22a. On this basis, the court of appeals remanded petitioners' claim against the Health District and San Juan County respondents to district court for a determination of the tribal court's subject matter

jurisdiction. *Id.* at 1228; P. App. at 25a. With respect to the district court's dismissal of petitioners' claim against Truck Insurance and Ickes, the court of appeals affirmed, concluding that the Navajo tribal court lacked jurisdiction pursuant to *Montana*. *Id.* at 1223-24; P. App. at 14a-15a.

REASONS FOR DENYING THE PETITION

Petitioners argue that the petition should be granted because in remanding petitioners' claim to enforce the tribal court orders as against the Health District and County respondents for an analysis of tribal court subject matter jurisdiction under *Montana* and its progeny[5] the court of appeals acted (i) contrary to the law of other circuits, and (ii) outside its own jurisdiction. For the reasons set forth below, this Court should deny the petition.[6]

[5] The Health District respondents address only the claim that the court of appeals erred in remanding petitioners' claim as against the Health District and San Juan County respondents. This brief does not address petitioners' claims of error with respect to Truck Insurance and Ickes.

[6] The Health District respondents have also filed a Conditional Cross-Petition for a Writ of Certiorari. As set forth in the Cross-Petition, respondents believe that the court of appeals erred not for the reasons set forth by petitioners, but rather in failing to affirm the district court's dismissal of petitioners' claim as against the Health District and County respondents on the basis of sovereign immunity.

I. THE COURT OF APPEALS' DECISION DOES NOT CONFLICT WITH *UNITED STATES V. ENAS*

Petitioners assert that the court of appeals' decision conflicts with *United States v. Enas*, 255 F.3d 662 (9th Cir. 2001) (en banc), *cert. denied*, 534 U.S. 1115 (2002), in which the United States Court of Appeals for the Ninth Circuit held that Indian tribes have criminal jurisdiction over non-member Indians under the 1990 amendments to the Indian Civil Rights Act ("ICRA"), 25 U.S.C. § 1301, *et seq.* According to petitioners, *Enas* holds that the reach of a tribal court's inherent sovereignty is not a constitutional issue to which the courts may speak, but rather an issue which only Congress has the authority to determine. Petition at 14. From this premise, petitioners argue that the court of appeals' failure to recognize tribal court jurisdiction over non-members under 25 U.S.C. § 1302(8), which contains ICRA's equal protection mandates,[7] conflicts with the *Enas* court's finding of tribal court jurisdiction under section 1302. In addition, petitioners assert a conflict exists because the court of appeals determined that *Montana* and its progeny should govern the district court's subject matter analysis, but under *Enas*, *Montana*

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[7] The relevant portions of section 1302 provide:

> No Indian tribe in exercising powers of self-government shall –
>
> . . .
>
> (8) deny to any person within its jurisdiction the equal protection of its laws or deprive any person of liberty or property without due process of law.

25 U.S.C. § 1302(8).

and its progeny are moot. Petitioners misinterpret *Enas*, and their argument is flawed from beginning to end.

A little background is important in understanding the holding of *Enas*. In *Duro v. Reina*, 495 U.S. 676 (1990), this Court addressed whether an Indian tribe may assert criminal jurisdiction over nonmember Indians (i.e., Indians who are not members of the prosecuting tribe). The Court concluded that Indian tribes do not possess this form of inherent sovereign authority, nor had Congress delegated such authority to the tribes. *Id.* at 688. In response to *Duro*, Congress enacted amendments to ICRA (the amendments are commonly known as the "*Duro* fix") that were intended to override *Duro*. These amendments redefined tribal "powers of self-government" as

> all government powers possessed by an Indian tribe, executive, legislative, and judicial, and all offices, bodies, and tribunals by and through which they are executed, including courts of Indian offenses; and . . . the inherent power of Indian tribes, hereby recognized and affirmed, *to exercise criminal jurisdiction over all Indians*.

25 U.S.C. § 1301(2) (2000) (emphasis added).[8] Congress' amendment was intended to override *Duro* in two ways. First, tribes were given *criminal* jurisdiction over nonmember Indians. Second, contrary to *Duro's* historical analysis, Congress stated that such jurisdiction was inherent, not delegated by Congress.

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[8] Prior to the amendments, this provision ended after the term "Indian offenses."

Subsequent to the *Duro* amendments, in *Enas*, a non-member Indian was prosecuted for the same conduct in both tribal court and federal court. Defendant protested that the dual prosecutions violated the Double Jeopardy Clause because the tribal court's criminal jurisdiction was congressionally delegated through the *Duro* amendments and, based on *Duro's* analysis, could not be considered part of the tribe's inherent powers.[9] The district court agreed with defendant and held the Double Jeopardy Clause precluded his federal prosecution. The Ninth Circuit reversed and remanded, finding that Congress, not the federal courts, had the last say on the nature of tribal court criminal jurisdiction over non-member Indians. The Ninth Circuit further held that through the *Duro* fix, Congress had declared that tribal inherent sovereignty included criminal jurisdiction over non-member Indians.[10]

Thus, contrary to petitioners' assertion, *Enas* did not hold and does not support petitioners' argument here and

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[9] Under established principles of Constitutional jurisprudence, dual prosecutions are allowed if a tribe is prosecuting pursuant to its inherent sovereign power, as opposed to congressionally delegated power. On the other hand, if a tribe is prosecuting pursuant to congressionally delegated power, it is acting as an arm of the federal government, and the Double Jeopardy Clause precludes both tribal and federal government prosecutions. *Enas*, 255 F.3d at 664 (citing *United States v. Wheeler*, 435 U.S. 313, 328 (1978)).

[10] In its separation of powers analysis, the Ninth Circuit found that the courts have the last say with respect to Constitutional issues, while Congress can trump a court on issues of statutory interpretation by amending the statute. *Enas*, 255 F.3d at 673. The Ninth Circuit found that *Duro's* historical analysis of a tribe's sovereign power over non-member Indians was one of "federal common law," which is more akin to statutory interpretation than Constitutional issues, giving Congress the last word on such issues. *Id.* at 674-675.

in the court of appeals that section 1302(8) provides tribal courts with general jurisdiction over non-Indians, rendering *Montana* and its progeny moot. First, *Enas'* finding that tribal courts have criminal adjudicatory power over non-member Indians was based not on the equal protection provisions contained in 25 U.S.C. § 1302(8), on which petitioners relied in the Tenth Circuit, but rather on the language of 25 U.S.C. § 1301(2). Following the *Duro* amendments, section 1301(2) specifically provides that the inherent sovereignty of tribes includes criminal jurisdiction over non-member Indians. *Enas* did not suggest that the language of section 1302(8) provided any basis for jurisdiction.

Second, *Enas* addressed, and was specifically limited to, the question of a tribal court's *criminal* adjudicatory power over non-member *Indians*. This case involves the question of a tribal court's *civil* adjudicatory power over *non-Indians*. Finally, *Enas* does not support petitioners' argument that federal courts lack authority to adjudicate the issue of tribal court jurisdiction, particularly in a case involving civil jurisdiction, thereby rendering *Montana* and its progeny moot. As noted above, *Enas* involved only the issue of tribal court criminal jurisdiction over non-member Indians, not civil jurisdiction over non-Indians. Moreover, *Enas* did not hold that courts cannot adjudicate the reach of tribal court jurisdiction, but only that the historical reach of tribal sovereignty involved interpretation of the federal common-law, an issue on which Congress has the last word.

In conclusion, *Enas* does not conflict with the court of appeals' decision in this matter or suggest that tribal courts have civil jurisdiction over non-Indians.

II. THE COURT OF APPEALS DID NOT EXCEED ITS JURISDICTION IN DETERMINING THAT *MONTANA* AND ITS PROGENY GOVERN THE ANALYSIS OF A TRIBAL COURT'S SUBJECT MATTER JURISDICTION

In reliance on various statutory or other authorities, petitioners argue Congress has clearly declared that tribal court sovereignty includes civil jurisdiction over all actions arising within the exterior boundary of a reservation, whether on tribe or fee land, including actions brought against non-Indians. Based on their interpretation of *Enas*, as discussed above, petitioners argue these "clear" congressional declarations in favor of tribal court jurisdiction render *Montana* and its progeny moot and establish that the tribal court had jurisdiction over petitioners' claims. Petitioners assert that in failing to recognize the tribal court's jurisdiction and instead remanding for a subject matter analysis under *Montana*, the court of appeals acted outside of its own jurisdiction. In fact, Congress has neither declared that tribal sovereignty includes civil jurisdiction over non-Indians, nor has it delegated such power to Indian tribes. The statutes and other authorities to which petitioners cite do not even address tribal court civil jurisdiction over non-Indians, much less confirm that such jurisdiction exists.

A. 25 U.S.C. § 1302 Does Not Provide a Basis for Tribal Court Civil Jurisdiction Over Non-Indians

Petitioners argue that because 25 U.S.C. § 1302 extends certain enumerated guarantees of the Federal Constitution to "any person," rather than "any Indian," Congress has declared that tribal courts have jurisdiction

over civil claims against non-members arising on the reservation. Petitioners' argument is without merit. Section 1302(8), on which petitioners rely, provides that tribes must provide equal protection or due process to any person "within its jurisdiction." This language establishes only that the tribe owes certain obligations to those who are within its jurisdiction; it does not establish the parameters of that jurisdiction or extend tribal court jurisdiction to non-members. *See Oliphant v. Squamish Indian Tribe*, 435 U.S. 191, 196 (1978) (the extension of certain due process and equal protection guarantees to all "persons" in section 1302(8) does not demonstrate congressional intent to confer tribes with criminal jurisdiction over non-members). Petitioners' assertion that section 1302(8) established a congressional delegation of general civil adjudicatory jurisdiction over non-Indians to tribal courts for any action arising within the exterior boundaries of the reservation is absurd.

B. The 2000 Technical Assistance Act Does Not Provide Tribal Courts with Civil Jurisdiction Over Non-Indians

Petitioners next contend that Congress has declared tribal courts have civil jurisdiction over non-Indians through the 2000 Technical Assistance Act (the "2000 Act"), codified at 25 U.S.C. §§ 3651 and 3665. The 2000 Act provides for certain financial and other assistance to tribal courts by the federal government. Section 3651 of the Act simply incorporates certain general findings by Congress regarding the importance of tribal courts. However, nothing in section 3651 specifically addresses tribal court civil jurisdiction over non-members, much less provides for such jurisdiction. Similarly, section 3665 addresses generally

the authority of the tribal courts and provides that nothing shall diminish the inherent jurisdiction of such courts. Again, section 3665's general acknowledgments regarding tribal courts do not in any way create a congressional declaration that tribal court jurisdiction includes general civil jurisdiction over non-members.[11]

Petitioners also cite to a provision in the Senate report that accompanied the 2000 Act, which states that tribal courts are charged with resolving the rights and interests of both Indian and non-Indian individuals. As an initial matter, a senate report is not legislation and does not have the force of law. *See In re North*, 11 F.3d 1075, 1078 (D.C. Cir. 1995). Moreover, given that the 2000 Act did not address tribal court jurisdiction, but rather involved funding for tribal courts, the senate report accompanying the 2000 Act clearly could not demonstrate Congress' intent to delegate civil jurisdiction over non-members to Indian tribes. Finally, the provision in the report to which plaintiffs cite contains language from *Montana* and an earlier case. Congress' recognition that situations may arise in which a tribe has jurisdiction over non-Indians, consistent with *Montana*, does not equate with a specific delegation or recognition of such authority. The senate report simply provides too tenuous a link on which to imply jurisdiction.

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[11] In their petition, petitioners string together pieces of different statutes to support their assertion that Congress has declared that tribes may exercise civil jurisdiction over non-Indians in actions arising within the exterior boundaries of a reservation. Petition at 19. In that section, petitioners cite to 25 U.S.C. § 1351 for the proposition that tribes are the "most appropriate" courts for resolving civil disputes. There is no section 1351 of title 25 of the United States Code.

As the *Duro* amendments demonstrate, if Congress wishes to recognize tribal court jurisdiction beyond that recognized by the courts, it can and has done so very directly. Petitioners have failed to provide any evidence that Congress has given tribal courts civil jurisdiction over non-Indians with respect to all claims arising on a reservation. Petitioners' request for certiorari is without merit and should be denied.

C. The United States' Ratification of the United Nations Covenant on Civil and Political Rights Does Not Suggest Tribal Courts Have Jurisdiction Over Non-Indians with Respect to Claims Arising Within

Petitioners argue that the United Nations International Covenant on Civil and Political Rights ("UNICCPR"), dated December 16, 1966, and allegedly ratified by the United States in 1992, authorizes tribal courts to exercise jurisdiction over all persons, including non-Indians, on the reservation. In making this argument, petitioners rely on general language in the UNICCPR providing that "States Parties" (parties to the covenant) will promote the right of self-determination for the non-self-governing and trust territories subject to their authority. Petition at 16. This language simply does not address the jurisdiction of Indian tribal courts, nor does it provide any basis for concluding that tribal courts have authority

over non-Indians with respect to matters arising on fee land within the exterior boundary of a reservation.[12]

D. Tribal Court Jurisdiction Over Non-Indians Is Not Mandated by Executive Orders

Finally, petitioners argue that Executive Order 13175, signed by President Clinton on November 6, 2000, and a November 21, 2001 proclamation issued by President Bush as part of National American Indian Heritage month (petitioners' Lodging at L-138), somehow demonstrate that tribal courts have jurisdiction over non-Indians with respect to any claim arising within the exterior boundaries of the reservation. Executive Order 13175, along with President Bush's later proclamation, are simply general expressions of support for tribal self-government. That the executive branch has voiced continued support of tribal governments and respect for tribal self-government is simply an inadequate basis on which to imply tribal court civil jurisdiction over non-Indians for actions that occurred

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[12] Petitioners also cite language purportedly from a Department of State report regarding UNICCPR, but they neither provide a complete copy of the report nor an adequate citation. For that reason alone, the Court should disregard this argument. Moreover, a report prepared by some unidentified employee or division of the State Department provides no basis for finding a congressional delegation of tribal court jurisdiction. Finally, petitioners rely on the report's citation to *Fisher v. District Court*, 424 U.S. 382 (1976), for the proposition that this Court has held tribal courts are the proper forums for the adjudication of civil disputes involving Native Americans and non-Native Americans arising on a reservation. In fact, in *Fisher*, this Court held only that the tribal court was the proper forum for litigation where all parties were tribe members, and the dispute arose on the reservation. *Id.* at 383, 389.

on fee-owned land within the reservation. Moreover, petitioners' claim of jurisdiction is based on their assertion that Congress has provided for such jurisdiction. Declarations of the executive branch regarding tribal sovereignty and authority are irrelevant to the question of *congressional* intent.

CONCLUSION

For the reasons set forth above, the Petition should be denied.

Respectfully submitted,

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IN THE DISTRICT COURT OF
THE NAVAJO NATION
JUDICIAL DISTRICT OF SHIPROCK, NEW MEXICO

DONNA SINGER; Fred Riggs C#18570; Alison Dickson C#212,765; Plaintiffs, vs. **SAN JUAN COUNTY**; San Juan Health Service District; Rick Bailey; Reid Wood; Lauren Schafer; Craig Halls; Commissioner Bill Redd; Roger Atcitty; Commissioner Mark Maryboy[1]; John Lewis Commissioner J. Tyron Lewis; Karen Adams; Patsy Shumway[2], and other John and Jane Does as yet unnamed in their personal and official capabilities, Defendants.	SR-CV-162-99 **ORDER DENYING DEFENDANTS' MOTION TO DISSOLVE OR MODIFY THE PRELIMINARY INJUNCTION ORDER**

THE COURT having received and reviewed (1) the defendants' "Motion to Dissolve or Modify Findings, Opinion and Judgment at Preliminary Injunction" and (2) the plaintiffs' response to the same motion, hereby denies the defendants' motion, and makes the following findings of fact and conclusions of law, that will incorporate herein and add to the original Preliminary Injunction Order raised in issue, as follows:

FINDINGS OF FACTS AND CONCLUSIONS OF LAW

I. The defendants accuse the Court throughout their motion of the Court denying the defendants due process of law in claiming the defendants were denied the services of an in courtroom certified court reporter.

Findings of Fact

The defendants requested by written motion that they be allowed to have a certified court reporter take oral transcription of the proceedings before the Court. The request was responded, in written response stipulating to the defendants motion. The Court granted the motion. The defendants never presented any qualified reporters for consideration of the Court. The Court is not responsible for what the defendants did not do.

The defendants were *never* denied the opportunity to have a Court Reporter present in the Courtroom; were *never* denied the opportunity to make further motions concerning the said reporter in the numerous hearings between April 24 and November 9, 1999; and were *never* denied the opportunity to make a written motion at any time in the last nine months. The only restriction on the reporter was that any such reporter would be able to perform their reporting services of non-Navajo, as well as Navajo speaking witnesses, and that counsel for the defendants was advised to seek out the services of the federal interpreters office in Albuquerque, New Mexico, for a listing of qualified Navajo speaking reporters – and it was likewise the case that the Court ordered the reporter to provide copies of the transcripts to both parties and this Court. The plaintiffs even concurred with the motion for the reporter.

Likewise, it was only the plaintiff Riggs, thusfar, who was prejudiced by the lack of a qualified reporter inasmuch as Navajo (his first language) was his preferred language in portions of his testimony, and he was denied the use of his own language in deference to the defense.

Conclusion of Law

The defendants were not denied due process of law and were provided with every opportunity to be heard as required by Navajo common law; by Navajo statutory law; by Navajo Rules of Civil Procedure; by applicable US law; by the Navajo Nation Bill of Rights, and by the 1968 Indian Civil Rights Act.

The defendants submitted motions; two 'Answers'; filed, responded to and argued motions; called witnesses; and even by the defendants own accord they invoked the jurisdiction of this Court on its own initiative by seeking the Court's authority and jurisdiction over its own counterclaims filed in this Court seeking its own independent damages as against the defendant Singer. No Court rulings prohibited them from further participation in any form or fashion. No Court order denied them the privilege of using a certified court reporter.

> "[T]he fundamental requirement of due process is an opportunity to be heard upon such notice and proceedings as are adequate to safeguard the right for which the constitutional protection is invoked."

Anderson National Bank v. Luckett, 321 U.S. 233, 246.

This court cannot possibly understand why it would be responsible for securing a qualified court reporter on

behalf of the defendants. Those duties and responsibilities fall squarely on the shoulders of the defendants and their counsel – the defendants requested the reporter – the defendants motion was granted with conditions – and the defendants failed thereafter to pursue and protect their interests as granted.

It is not the duty of the Court to provide a reporter, other that what is provided under the limited budget of the Court. It is, however, the case that this Court determine the qualifications of those persons to whom it would entrust the record of the Court for purposes of accuracy and trustworthiness of the record. The Court is not obliged to simply rely on the representations of the party seeking the assistance of an independent and qualified court reporter. A court reporter is essentially an officer of the Court, not an agent of the party paying the reporter.

II. The defendants argue to the Court that they were denied due process of law due to a lack of a perfect record of the proceedings before the Court for cause of interment inaudibles found in the Courts own recording/reporting system.

Findings of Fact

The defendants and plaintiffs were ORDERED from the bench to report any problems with the hearing transcripts to the Court on November 9, 1999, and neither party did so. Both the defendants and the plaintiffs became aware of concerns in the transcription of the taped proceedings nearly a full month prior to submitting their written conclusions, by written notice, as was the Court. In fact, after the very first proceeding it was cautioned by counsel for the plaintiffs, Wm. P. Battles, that the record

was being garbled and asked that the Court caution the speakers in reference to preserving the record. The defendants, as well as the plaintiffs, were free to make motions for new hearings or other protective motions prior to the filing of their written concluding statements, but failed to do so and instead – like the plaintiffs – submitted their closing arguments on the record as presented.

Wherein the trial record as a whole, including hearings on April 24, 1999; May 14, 1999; June 30, 1999; and November 9, 1999; along with records of the September 23rd and 24th proceedings, of 1999, are all available to this Court and the parties, and well evidence the foundation and outcome of the Courts considerations in rendering the decision to grant the Preliminary Injunction – despite the lack of a "perfect" trial record as claimed required by the defense.

The defendants knew they were obligated to put on evidence to rebut the plaintiffs evidence and simply failed to do so. Indeed, moreso than not, the record and recollection of the Court actually reflects that the majority of the evidence and testimony solicited and presented to the Court by the defendants actually went to support each and every claim of the plaintiffs as raised in these proceedings. Accordingly, the defendants failed to offer the Court barely so much as one piece of evidence that was reliably found to be admissible within the Navajo Nation Rules of Evidence, or in aid to their assertions contrary to those of the plaintiffs.

Conclusions of Law

The defendants were not denied due process pursuant to the 'harmless error' rule of ***Chapman v. California***,

386 U.S. 18, (1967) that *overturned* the case of ***Griffin***, upon which the defendants would apparently prefer the Court to rely as they assert – and for which the defendants, through counsel, had a responsibility to inform the court of, in that ***Griffin*** had been superceded by ***Chapman*** – but failed to do so.

Further, the defendants are not being denied the ENTIRE court record, as found in the cases they rely upon and therefore defendants' case cites are without merit in *this* case – but in misguiding this Court.

The Court therefore concludes that as a matter of law, notwithstanding our own Rule 61 of the Navajo Nation Rules of Civil Procedure, and in agreement to ***Chapman***, the existence of inaudible sections of the tape recordings is harmless, when the record can still remain to be considered in its whole dispositive of the findings, conclusions and orders of the Court.

As offered by the United States Supreme Court –

> *"Since* ***Chapman****, we have "consistently made clear that is it the duty of a reviewing court to consider the trial record as a whole and to ignore errors that are harmless, including most constitutional violations."* ***United States v. Hasting****, 461 U.S. 499, 509 (1983). In* ***Hasting****, we again emphasized that "given the myriad safeguards provided to assure a fair trial, and taking into account the reality of the human fallibility of the participants, there can be no such thing as an error-free, perfect trial, and . . . the Constitution does not guarantee such a trial." Id. at 508-509."* ***United States v. Lane et al****,* 474 U.S. 438, 446 (1986).

The court here, in considering the trial record as a whole, finds the same well supports the findings and conclusions of this Court without any question in the mind of the Court – whatsoever.

III. The next argument offered by the defendants is that the Preliminary Injunction should be denied or modified because the findings go to the merits of the case.

Findings of Fact

The burden of coming forward in the seeking of a Preliminary Injunction, *premised on the case in chief* under the Navajo Nation Rules of Civil Procedure, is elementary. Pursuant to Rule 65(c) the moving party, here the plaintiffs, are put to the burden of "*presenting evidence sufficient for the court to find* ***all*** *of the following*"

> *That the moving party has or is claiming a protectable right or interest and has a high likelihood of success on the merits;*
>
> *That irreparable injury, loss, or damage, to that right or interest is likely to occur unless the preliminary injunction is issued;*
>
> *That the threatened injury, loss or damage is substantial in nature or character; and,*
>
> *That the moving party does not have an adequate remedy at law.*

Likewise, Rule 65(d) of the Navajo Nation Rules of Civil Procedures, provides, for judicial economy, not dissimilar from any other jurisdiction of our sister sovereign the United States, that:

> *Before or after the commencement of the hearing of a petition for a preliminary injunction, the court may order trial on the merits to be advanced and consolidated with the hearing of the petition.* ***Even when this consolidation is not ordered, any evidence received upon a petition for a preliminary injunction, which would be admissible upon the trial on the merits, becomes part of the record at trial and need not be repeated at trial. This subdivision shall be construed to save the parties any rights they may have to trial by jury.***

The Defendants were *warned* several times during the proceedings that they were failing to meet their responsibility of rebutting the plaintiffs evidence and testimony and that they were proceeding in nearly a fatal fashion to not only the preliminary injunction but as to the case in chief and that likewise they were thus far actually reinforcing the contentions of the plaintiffs in defense witness after defense witness, and the collective of the evidence and testimony before the Court was overwhelmingly in favor of the plaintiffs.

And accordingly,

The plaintiffs proved **absolutely** that they were being denied protectable rights which were guaranteed at law and therefore had a certain likelihood of success on the merits – which is largely reduced to damages; and,

The plaintiffs likewise proved that unless relief was granted, by way of a preliminary injunction or otherwise, that such violations on their protectable rights would continue with resulting injuries, losses, and damages.

> That the injuries, losses, and damages were substantial in both their nature and character, including injuries ranging from damages to reputation to money damages; and,
>
> And that unless a preliminary injunction was granted the harm, injuries, damages, and losses, would continue unimpeded.

Likewise, the Court is obliged by Rule of Court and in the exercise of judicial economy to receive during the proceedings on the preliminary injunction evidence which is likewise admissible in the case in chief *as though occurring during the trial on the merits*, and that evidence becomes a part of the record at trial and need not be repeated at trial. See Rule 65(d). Such preservation of the record does not go to taint the trial by jury requested by the plaintiff, but does substantially reduce their burden of proof which has already well been met even as to the case in chief. Whereas, as the Court would note, that but for the preservation of a trial by jury, in most instances of preliminary injunctions it is more normal to actually combine the proceedings in chief with the proceedings for the preliminary injunction.

For example, Lauren Schafer, a defendant's witness, admitted on September 24, 1999, that after an exhaustive study of Mrs. Singer's records, she did not have one piece of evidence as to Mrs. Singer's intent to commit fraud.

For example, the Court observed that the person who initiated the termination process, was also the grievance hearing officer (unbeknown to Singer) and admitted he had a problem with being so thinking that it was improper for him to proceed by his won judgment but did nonetheless.

For example, no defenses were made for the treatment of Fred Riggs and Al Dickson, except that the time card errors diminished after the discipline meted out, supporting the theft claim of the plaintiffs in that their reputations were taken without their permission for use of the district to discourage time card errors and for speaking out regarding discrimination and unequal treatment of Native Americans in employment with the Health Services District.

For example, the defense presented evidence that the reason that Singer was fired was because she allegedly called in to work to have someone punch her time card, and then offered testimony of one witness that such conduct was common among the employees of the Health Services District, and so common in fact that she herself had certainly done the same thing "at least a hundred times" but had never even been disciplined in any form or fashion. This witness was non-Indian.

For example, human beings being somehow seriously referred to in such a way as to make people believe because they are Native Americans they are being called dogs – is only something this Court would prefer to hear the evidence on only one time – in its life time.

For example, coming to understand that because Native American elders, grandmothers, and grandchildren are being denied medical care and treatment even as under a direct government contract with the United States Government to provide health care to Native Americans because they are being arbitrarily required "to show their Certificate of Indian Blood" to actually receive necessary health services, when the required documentation for Health Services through the Indian Health Service is a

"Beneficiaries Identification Card" at most, is something this Court would have preferred to have never heard.

The Court's resources, and the plaintiffs resources are limited – and the findings, facts and case are clear even as to the merits in chief.

Conclusions of Law

The findings of the Court had no alternative but to reach to the merits, as such is the primary burden of the plaintiffs coming forward. The plaintiff had a clear duty to demonstrate to the Court that they are substantially entitled to judgment on their case in chief, in order to prevail on the preliminary injunction. The defendants, likewise, failed to put on any credible evidence to rebut the volume of testimony and evidence of the plaintiffs, after having ample opportunity to have done so.

The Court is therefore well within its rights to find to the merits, the same way as a Court may find for a party if the plaintiff fails to prosecute a claim, in order to protect the due process rights of the plaintiffs, and to protect the Court's processes from being used for harassment and other wasteful and abusive purposes.

The Court, given the proceedings to date, the testimony and evidence of record, is obligated to grant relief to the plaintiff and provide relief to those harmed, damaged, and injured.

> *"Courts invested with the judicial power of the United States have certain inherent authority to protect their proceedings and judgments in the course of discharging their traditional responsibilities."* ***Chambers v. NASCO, Inc.****, 501 U.S.*

32, 43-46 (1991); ***Link v. Wabash R. Co.,*** *370 U.S. 626, 630-631 (1962). The Supreme Court recognized in* ***Roadway Express,*** *that outright dismissal of a lawsuit, which has been upheld in* ***Link*** *is a particularly severe sanction, yet is within the court's discretion. 1st Sess., 6 (1852);* ***Roadway v. Piper,*** *447 U.S. 752, 756 (1980)."*

The Preliminary Injunction was addressed to rectifying the harm done. The defendants' recommendation fails to address the financial harm suffered by the plaintiffs which has injured their families, as well as, failing to recognize, much less rectify, the harm to their reputations and the patients. As such, the Court finds the Injunctive Order is well within the three prongs of ***Missouri v. Jenkins***, ___ U.S. ___ (1995), at page 16. The defendants neither recognized the three prong test of ***Missouri*** in their pleadings, nor recognize the Navajo tradition of compensating injury with money or other things of recognizable uniform value.

The defendants' definition of 'status quo' differs from the Court's, in that, the Court's definition wishes to place the plaintiffs in nearly as good a position as they would have been without the harm of the defendants and that includes financially.

IV. The defendants rather vaguely continue to misstate and minimize the Court's jurisdiction.

Findings of Fact

A 'forum of resolution' and the premise of having a hearing for injured parties among Native American people predates the European settlers and is well grounded in Navajo customs and traditions. This tradition has

continued through the continuum of history, and in contemporary time has come to include the provisions of the United States Congress by way of the 1968 Indian Civil Rights Act which colored tribal courts with federal legislative mandates in 25 USCS § 1301.

And accordingly the Court cites to tribal code and ***Montana*** and ***Strate***, to further its finding of jurisdiction.

Conclusions of Law

The Court has jurisdiction over the defendants partly because they are the named parties who have committed acts within the Navajo Nation territorial boundaries, and as well because the defendants became plaintiffs by filing their counterclaims. In accord with ***Dodge v. Nakai***, 298 F. Supp. 17 (Ariz. dist. 1968) and ***Clark v. Barnard***, 108 U.S. (1883). This Court has jurisdiction.

Alternatively, the Court also has jurisdiction over the defendants because, even if, the defendants are an 'arm of the state', (which they have not shown any evidence to support), the defendants waived any rights of immunity when they filed counterclaims and fully participated in the Court proceedings. The Court therefore concludes that it has legal foundations for jurisdiction in this case, within the Navajo Nation's inherent sovereignty, the Navajo Nation Code, 25 U.S.C.S. §1301 and 1302, the ***Montana*** and ***Strate*** decisions, and the United States Supreme Court rulings in ***Clark v. Barnard***, 108 U.S. (1883) as cited approvingly in ***College Savings Bank v. Florida Prep Aid Postsecondary Education Expense Board et al.***, ___ U.S. ___, decided June 23, 1999.

> *"We are relieved, however, from its consideration by the* ***voluntary appearance*** *of the state in*

> *intervening as a claimant of the fund in court. The immunity from suit belonging to a state, which is respected and protected by the constitution within the limits of the judicial power of the United States,* ***is a personal privilege which it may waive at pleasure; so that in a suit, otherwise well brought, in which a state had sufficient interest to entitle it to become a party defendant, its appearance in a court of the United States would be a voluntary submission to its jurisdiction****, while, of course, those courts are always open to it as a suitor in controversies between it and [108 U.S. 436, 448] citizens of other states."* ***Clark v. Barnard****, 180 U.S. 436, 448 (1883).*

In conclusion, the Court finds the arguments and case cites of the defendants without merit or legal foundations. The Court, despite previous denials, now attempt to justify their placing of Native American patients in danger in a cloud of "confusion" on the 14th day of May, 1999. The prior Temporary Restraining Order directed the defendants to not interfere with the Clinic operations. This effort of the defendants at this juncture lacks sincerity. The defendants' motion to dissolve the preliminary injunction lacked even so much as an apology for the harm they have done over the last nine months of billing indigent Native American patients discouraging their attendance to both emergency and routine health care. The motion of the defendants lacks even the smallest appreciation for their blatant violations of civil rights of the plaintiffs that has torn a family apart, and grossly harmed the plaintiffs, and innocent patients and families relying on the clinic for health care.

Likewise such cold, insensitive, and recalcitrant attitudes on the part of the defendants further goes to illustrate the defendants bad faith to these proceedings and presents a foundation from which so much prejudice can grow from like a scavenging parasite of people ignorant of the harm of their malignant acts, and who lack any remorse for their harm to the plaintiffs, the patients and this Court.

The Preliminary Injunction, and findings of the Court, accordingly shall remain undisturbed. To do so would continue to place Navajo employees and patients who the defendants interact with at both Montezuma Creek Clinic and at Monument Valley, in harm's way. Navajo common law, is customs and traditions, mandate that the Court protect the people, and this Court shall not hesitate to exercise all its powers to do so.

The Motion to Dissolve or Modify the Preliminary Injunction Order be and is, therefore, denied.

IT IS THEREFORE ORDERED that pursuant to the Navajo Nation Rules of Civil Procedure at Rule 11 and this Court's tribal and federal authorities, and the Court's recognized inherent authority to protect its judicial processes, the Court hereby ORDERS as follows pursuant to its Preliminary Injunction:

That the Motion to Dissolve or Modify the Preliminary Injunction Order be and is hereby denied.

The Preliminary Injunction as issued shall be carried out immediately, and no later than the 3rd day of March, 2000, in all respects, with written confirmation delivered to this Court on or by that date, or be subject to the contempt powers of this Court.

That the defendants be and are hereby ordered to immediately reinstate Mrs. Singer as a x-ray and ultrasound technician making her whole to the 1st day of November, 1998, not later than the 3rd day of March, 2000, with written confirmation delivered to this Court on or by the 3rd day of March, 2000, or be subject to the contempt powers of this Court.

That the defendants be and are ordered to immediately reinstate the plaintiff Mr. Riggs to his previous position of employment and compensation as occurring at the time of his reduction in force and reduction of pay with written confirmation delivered to this court on or by the 3rd day of March, 2000, or be subject to the contempt powers of this Court; and,

That the defendants be and are hereby ordered to immediately tender to Mr. Dickson full time status as an employee of the Montezuma Creek Clinic and that he be paid all commensurate back pay and benefits as may be due to him from the occasion of his being eligible for such status; and provide written confirmation of such compliance on or by the 3rd day of March, 2000, or be subject to the contempt powers of this Court; and,

That the defendants be and are hereby ordered to immediately pay all due income from whichever source derived within the District, including but not limited to full back pay and compensation as well as back benefits to the plaintiffs, including but not limited to retirement benefits and other compensations regularly received by the plaintiffs with all such compensations to be credited and/or paid immediately with confirmation of such compliance delivered in writing to this Court on or by the 3rd day of March, 2000, or be subject to the contempt powers of this court; and,

That the defendants be and are hereby ordered to delete and expunge all the charges and writings pertaining to the December 2nd through the December 8th 1998 charges of fraud, discipline, and termination, from Mr. Riggs and Ms. Singer's personnel file, with written compliance delivered to this court on or by the 3rd of March, 2000, or be subject to the contempt powers of this Court; and,

That the defendants be and are hereby ordered to not, within the territorial jurisdiction of the Navajo Nation, put Ms. Singer, and other like managers, and Mr. Riggs, and other like Physicians Assistants, on hourly time card keeping requirements for the purposes of salary and compensations or otherwise, and provide a copy of the written policy to this effect on or by the 3rd day of March, 2000, or be subject to the contempt powers of this Court; and,

That the defendants be and are hereby ordered to not interfere with clinic operations or move any clinic personnel, or be subject to the contempt powers of this Court; and,

That the defendants be and are hereby ordered to issue full payment of attorney's fees, costs, and expenses associated with these proceedings to date to be paid by cashier's check within five working days of the issuance of the injunction and to be paid not later than the 31st day of March, 2000, by and through the Registry of this Court, or each and every one of the defendants shall be subject to execution on their personnel properties, and otherwise individually subject to the contempt powers of this Court; and,

That the prior Order of the court waiving any security deposit of the part of the plaintiffs be and is hereby affirmed; and,

That the Defendants be and are hereby prohibited from:

Eliminating any Emergency Medical Technician services and coverage within the territorial jurisdiction of the Navajo Nation in service to the local Navajo and other Native American population for or on behalf of the Montezuma Creek Clinic or any other facility or activity of the San Juan Health Services District conducted within the territorial jurisdiction of the Navajo Nation; and, Interfering with the laboratory services to the Montezuma Creek Clinic or any other facility or activity of the San Juan Health Services District conducted within the territorial jurisdiction of the Navajo nation; and,

Interfering with the pharmaceutical services provided to the Montezuma Creek Clinic or any other facility or activity of the San Juan Health Services District Conducted within the territorial jurisdiction of the Navajo Nation

That the defendant shall immediately make payment of any and all current and past due billings of the Montezuma Creek Clinic occurring before the 1st day of January, 2000, and provide written confirmation of such payments on or before the 3rd day of March, 2000, or be subject to the contempt powers of this Court; and,

That the defendants be and are prohibited from interfering with any form of patient care being provided by the Montezuma Creek Clinic; and,

That the defendants be and are hereby immediately ordered to cease billing eligible IHS patients for medical services; and,

13. That the Court further hereby Orders the defendants to assist the Montezuma Creek Clinic and the local Navajo Chapters, and chapter governments, by any means necessary, including Navajo and Ute language announcements on Navajo Nation wide radio; letters, etc. to help diabetic IHS patients to return to the Montezuma Creek Clinic for treatment, including informing such Native American patients that as an IHS patient they do not have to directly pay for their health care treatment at the Montezuma Creek Clinic, with written confirmation of such compliance provided to this Court on or before the 3rd of March, 2000, or be subject to the contempt powers of this Court; and,

14. That the Court further Orders that the plaintiffs report any such interference, harassment, or intimidation of Montezuma Creek Clinic operations, patients, and employees immediately to this Court; and,

That the proceedings in chief herein be and are hereby scheduled for initial pretrial conference on the 18th day of APRIL, 2000, unless these proceedings are not earlier settled and compromised by the parties by stipulation on the limited factual; legal; and damage issues remaining as previously noted to the Court.

So Signed and Ordered this 1 day of March, 2000.

/s/ [Illegible]
JUDGE, District Court of the
Navajo Nation

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[1] That in the event that the defendants fail to obey the Order of this Court, commencing the 4th day of March, 2000, the defendants shall be fined at the rate of $10,000.00 (Ten Thousand Dollars) per day, for each and every day the Order of this Court is not carried out in its entirety.* * * * *

[2] That each and every personal defendant and defendants counsel will pay $1000 per day of the $10,000 daily fine beginning on March 2, 2000, from their own personal assets

[3] That any and all appeals or attempted appeals will not forestall these fines if the Preliminary Injunction Order is not carried out in accord with this Order.

[4] Such fines are a fair and just means for this Court to protect its judicial processes, and to ensure its orders that protect the people, will be carried out.

IN THE DISTRICT COURT OF THE NAVAJO NATION JUDICIAL DISTRICT OF SHIPROCK, NEW MEXICO

DONNA SINGER, Fred Riggs C#18570; Alison Dickson C#212,765. Plaintiffs, vs. **SAN JUAN COUNTY**; San Juan Health, Service District; Rick Bailey; Reid Wood; Lauren Schafer; Craig Halls; Commissioner Bill Redd; Roger Atcitty; Commissioner Mark Maryboy; John Lewis; Commissioner J. Tyron Lewis; Karen Adams Patsy Shumway; and other Johon and Jane Does as yet unnamed in their personal and official capabilities, Defendants.	**SR-CV-162-99-CV** **SPECIAL ORDER IN AID TO SATISFACTION OF PRELIMINARY INJUNCTION**

NOW COMES THE COURT and having received and reviewed the plaintiffs' motion for a special order and finding good cause therein hereby Orders as follows:

1. That the defendants are hereby restrained from alienating any and all money, property and assets of any type until the plaintiffs are paid their relief as granted in the Preliminary Injunction Order; and.

2. That a list of all assets be immediately given to the plaintiffs since the defendants admitted in their concluding statement that the defendants state of finances were in a precarious position; and.

3. That defendants immediately list the plaintiffs first in order of priority as secured creditors on the files of the County Recorder of San Juan County and any other county wherein their property is located; and.

4. That the defendants provide a complete income tax return for 1998 and 1999, including all attachments and schedules submitted to the IRS with the returns; and.

5. That any disobedience to this Order will be viewed as contempt of the Court and warrants for the arrest of the defendants disobeying this Order will issue; and

6. That the plaintiffs are granted leave to seek enforcement of this Order as appropriate in any Utah or federal Court where it will be enforce pursuant to principles of comity and applicable law.

So signed and this 6 day of March ~~February~~, 2000.

/s/ [Illegible]
JUDGE RAYMOND A. BEGAYE

IN THE DISTRICT COURT OF THE NAVAJO NATION JUDICIAL DISTRICT OF SHIPROCK

DONNA SINGER, Fred Riggs C#18570; Alison Dickson C#212,765; Plaintiffs, vs. **SAN JUAN COUNTY;** San Juan Health Service District; Rick Bailey; Reid Wood; Lauren Schafer; Craig Halls; Commissioner Bill Redd; Roger Atcitty; Commissioner Mark Maryboy[1]; John Lewis; Commissioner J. Tyron Lewis; Karen Adams; Patsy Shumway,[2] and R. Dennis Ickes, Farmers/Truck Insurance Co. and John and Jane Does as yet unnamed in their personal and official capabilities, Defendants.	**SR-CV-162-99-CV** **ORDER MANDATING THAT ALL DEFENDANTS' TO BE BOUND BY THE PRELIMINARY INJUNCTION ORDER**

Now comes the Court, having received and reviewed the plaintiffs' motion to bind the defendants R. Dennis Ickes, Esq. and Farmer's Insurance Group of Companies and/or Truck Insurance by the Preliminary Injunction

[1] In his official capacity only.

[2] In her official capacity only.

Order, based upon the findings of the Court in the Preliminary Injunction Order, after approximately 6 hearings over a nine month period. The Court bases this Order upon the following findings of fact and Conclusions of Law;

1. On December 28, 1999, the Court made factual findings pertaining to misrepresentation of case law and facts, intimidation of witnesses, spoilation of evidence, upon which the plaintiffs have made a motion for a supplemental pleading, and that said activities were known, or should have been discovered easily by a reasonable investigation that is required pursuant to NNRCP at Rule 11; and,

3. That the new defendants, Mr. Ickes and Farmer's Insurance Group of Companies and/or Truck Insurance, as based upon the Court's findings, did participate in these activities prior to the issuance of the preliminary injunction order, and,

4. That the new defendants, Mr. Ickes and Farmer's Insurance Group of Companies and/or Truck Insurance, did participate fully in all the proceedings from approximately April 23, 1999 through November 9, 1999, and in the defendants' motion to dissolve or modify the Preliminary Injunction Order, dated December 28, 1999; and,

5. That Mr. Ickes, and Farmer's Insurance Group of Companies and/or Truck Insurance Company, as his employer, were aware, or should have been aware, of the actions of the defendants, and their own actions in privity with the defendants, based upon a reasonable investigation as required pursuant to NNRCP at Rule 11; and,

Therefore, the Court now Orders that Mr. Ickes and Farmer's Insurance Group of Companies and/or Truck Insurance Company are to be bound in privity with the

previous defendants in this action as now identified John and Jane Does, who prolonged the proceedings, and further deprived the plaintiffs' of due process and equal protections of the law, and are hereby bound by the Preliminary Injunction Order of December 28, 2000, and their names will be herein after, added to the defendants' caption, and are officially declared to have responsibility for all legal liabilities incurred by the defendants as declared in the December 28, 1999, Preliminary Injunction Order.

Signed this 27 April day of 2000.

/s/ [Illegible]
Judge Raymond Begaye

Supreme Court, U.S.
FILED
MAY 8 2003
OFFICE OF THE CLERK

(3)

Nos. 02-1253

In the

Supreme Court of the United States

FRED RIGGS, DONNA SINGER and AL DICKSON,

Petitioners,

v.

SAN JUAN COUNTY, SAN JUAN HEALTH SERVICES DISTRICT, County Commissioner J. TYRON LEWIS, County Commissioner LYN STEVENS (official capacity only), County Commissioner MANUAL MORGAN (official capacity only), RICK BAILEY, County Attorney CRAIG HALLS, BILL REDD, REID WOOD, KAREN ADAMS, ROGER ATCITTY, PATSY SHUMWAY (official capacity only), JOHN LEWIS, LAUREN SCHAFER, TRUCK INSURANCE EXCHANGE AND DENNIS ICKES; and new district officers, NETTIE PRACK (official capacity only), GLEN IMEL (official capacity only), CLEAL BRADFORD (official capacity only), JOHN FELMETH (official capacity only) and as yet unnamed JOHN AND JANE DOES, in their official and individual capacities, jointly and severally,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

REPLY BRIEF

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PARTIES

The Respondents list of parties is incomplete. Bill Redd, past San Juan County Commissioner, is still a party in his private capacity now, Cleal Bradford, Grant Imel, Nettie Prack, and John Felmeth, have been appointed as San Juan Health Services District ('District') governance board members since the enforcement action began, and under Federal Rule of Civil Procedure at Rule 25, they are now named as parties in their 'official capacities only.'

PARTIES WITH LEGITIMATE REPRESENTATION

This Court is still uniformed as to San Juan County (County) and San Juan Health District (District) as constituent organizations', legal positions. See Petitioners response to Cross Petitions docket no. 02-1444; 02-1445.

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RESPONDENTS' STATEMENT OF THE CASE

There are some errors of the Respondents that Petitioners wish to correct. Petitioners in their Response to the Cross-Petitioners mistakenly stated the County did not respond to the original petition. Petitioners apologize. Notably, Respondents fail to produce one document, one quote from a Navajo Court document showing lack of due process, Petitioner's bad faith, or denial of the harms and facts as found by the Court.

•Resp. Brief. Pg. 3 - The Utah statute 17A-2-1204, listed as a basis for the District's origination, is a typographical error. No such statute exists. Utah code 17A-2-1304 .

•Resp. Brief Pg. 3 - Montezuma Creek Clinic (MCC) operates not on 'fee' land, but 'trust' land, owned by the Utah Navajo Trust Fund. *United States v. Jim*, 409 U.S. 80, 81-82 (1972). [1] The Tenth Circuit agrees. P. Ap. 3a. The Respondents err the "Health District owned and operated the Montezuma Creek Clinic,.... " This, is a huge error.

•Resp. Brief pg. 4 fn. 1 -The primary defense raised in Navajo Court were that the defendants were entitled to immunity using *Alden v. Maine*, 527 U.S. 706(1999) as stated on P. Ap. 30a. Pg. 4 Fn.2. The Respondents now argue they are not subject to the Navajo Preference in Employment act, but failed to raise it below in Navajo court.

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[1] The Utah Navajo Trust Fund is a 'private-purpose' fund (Utah 63-88-102(1)), "for the health, education, and general welfare of the Navajo Indians, residing in San Juan County" as required by federal mandate: (i) P.L. 72-403, 47 Stat. 1418 (1933); (ii) P.L. 90-306, 82 Stat. 121 (1968); and (iii) this chapter (63-88- 105(q)(f). **The land and clinic is bought with Navajo Money, from Navajo Federal royalties, for Navajo people, under the Navajo Treaty of 1868.**

•Resp. Brief pg. 3 There is no dispute that the Health District and County provided health care via the Districts' Indian Health Service ('I.H.S.') contract as an *independent* contract provider- an important omission. (P. S. L. 19-27). Respondents were not instrumentalities of the federal or state government, and those fiscs are not at risk here..

•Resp. Brief pg. 3- While the clinic is no longer part of the District the Respondents can work for the District, if only for one day, in order to get all benefits, back pay, and files cleared, with all amounts to be calculated by the Navajo court authority.

•Resp. Brief pg. 4 -*The legal violations in the* ***Navajo*** *Orders are consistently referred to by the* ***Navajo*** *Judge are only* ***Navajo*** *law violations.* The **Navajo** Court orders, referring to theft, defamation and other torts, in a **Navajo** Court, were referring to **Navajo** torts as verified by references throughout to **Navajo** customs and traditions, **Navajo** case law, **Navajo** statutes. No where in the Orders is 42 U.S.C. 1983 or state relief.

•Resp. Brief pg. 4 The Respondents omit they raised ***voluntary*** **COUNTERCLAIMS**, paid the Court filing fee, for alleged NAVAJO tort claims, of fraud, etc.. [2]

Again the Respondents Misstate the Claims Affirmatively and by Omissions

Resp. Brief pg. 5. Petitioners raise more than only Employment Claims. *Every* claim for Petitioners addressed by the Navajo Court was in the Application for the Preliminary Injunction. P. S. L. 1-21a. It is for the Navajo Court to determine how the orders are carried

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[2] P. Ap. 97a ('defendants, for example, plead fraud, without one piece of evidence as to Singer's intent to commit fraud and without the specificity of pleadings as required by the Navajo Nation Rules of Civil Procedure at Rule 9'), P. L. 10 ('the defendants waived any rights of immunity when they filed counterclaims and fully participated in the Court proceedings.")

out, or determine if they are overly broad or if they are moot, for Navajo violations. *Santa Clara Pueblo*, *infra*. Tribal law doctrine allows tribal members to raise claims for other tribal members. Tribal Courts have jurisdiction over collection efforts.[3] Patients had no liability for payment. [4]

The Respondents shut the ambulance garages etc. P. Ap. 72a. The County gets federal payments in lieu of taxes for services to the Navajo people. P. S. L. 9-11. The Navajo Court was correct to tell them not to threaten lives by withdrawing services.

The Attorneys Fees

•Resp. brief pg. 4 The attorneys fees of about $500,000 for the Navajo Court litigation involves four attorneys and one accountant, traveling by car to Shiprock, N. M., (no airports in Shiprock) from Salt Lake

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[3] 25 U.S.C. §§ 194 (protection of Indians); 229(the Petitioners were to go to the tribe for compensation); 231 (says nothing about privately billing publicly insured Indians); 85 (off reservation contracts did not have the previous U.S. consent for on reservation residents); 1621a (federal government will pay health claims promptly). "Congress has also acted consistently upon the assumption that the States have no power to regulate the affairs of Indians on a reservation. To assure adequate government of the Indian tribes, it enacted comprehensive statutes in 1834 regulating trade with Indians and organizing a Department of Indian Affairs. 4 Stat. 729, 735. Not satisfied solely with centralized government of Indians, it encouraged tribal governments and courts to become stronger and more highly organized. *See, e.g.*, the Wheeler-Howard Act, §§ 16, 17, 48 Stat. 987, 988, 25 U.S.C. §§ 476, 477." *Williams v. Lee*, 358 U.S. 217, 220 (1959).

[4] Public law 102-573, "Sec. 222 (a) A **Patient** who receives contract health care services that are authorized by the Service Unit CHS [Contract Health Services] **shall not be liable for payment of any charges or costs associated with the provision of such services**; (b) The Service Unit CHS shall notify a contract care provider and any patient who receives contract health care services authorized by the Service Unit CHS that **such patient is not liable for the payment of any charges or costs associated with the provision of such services**."

City and Window Rock, payment for travel, copying costs, room and lodging, and phone bills. Attorneys are entitled to be paid billable hours away from other cases while having to travel. Nevertheless, this billing issue, if it is an issue, is for the Navajo Court to determine, for which they may appeal in Navajo court.

The Navajo Court Fines

•Resp. Brief pg. 5 The Navajo Court fines were *conditional* P. L. 16. The Order's clear words are "That IN THE EVENT THAT THE DEFENDANTS FAIL TO OBEY...." It doesn't take a nickels worth of common sense to read it differently. Respondents could have avoided the fines altogether. Likewise, irreparable harm is ongoing as long as the Petitioners' harms are ignored and damages continue to escalate.

Immunity Arguments are Non-Applicable

•Resp. Brief pg. 6-7 The Respondents omit informing this Court that the immunity issue was resolved. The Tenth Circuit Court in this case below, found

> "Contrary to the County defendants' assertion on appeal, ...tribes are not subordinate to states, [citations omitted], and certainly not to counties.... We must reject County appellee's assertion "that the natural dominion of States and their political subdivisions over tribal governments was clearly established before the United States *Constitution* came into being and that there has been nothing post *Constitution* to change that fact."

MacArthur et al v. San Juan County et al, 309 F.3d 1216 (10th Cir. 2002). P. Ap. 11a.

•Resp. Brief pg. 7 The Respondents fail to inform the Court that the 10th circuit Court demanded a study of subject matter jurisdiction under *Nat'l Farmers Union Ins. Cos. V. Crow Tribe*, 471 U.S. 845, 855-56 (1985) 'for

a detailed study of relevant statutes, Executive Branch policy as embodied in treaties and elsewhere, and administrative or judicial decisions." P. Ap. 25a. *Montana* and progeny splits with *Nat'l Farmer's*, federal code provisions, Executive Branch policy, *supporting* Tribal authority.

> "... It is immaterial that respondent is not an Indian. He was on the Reservation and the transaction with an Indian took place there. The cases in this Court have **consistently guarded the authority of Indian governments over their reservations**. Congress recognized this authority in the Navajos in the Treaty of 1868, and has done so ever since, **If this power is to be taken away from them, it is for Congress to do it.**"

Williams v. Lee, 358 U.S. 217 (1959).

Either rulings prior to *Oliphant* were Constitutionally correct, or after *Oliphant*, not both.

COURT OF APPEALS DOES CONFLICT WITH UNITED STATES V. ENAS

•Resp. Brief 9-12. The **Respondents support** the Petitioners' argument of Congress' definition of Indian Tribal Court jurisdiction being at odds with this Court and *United States v. Enas*, 255 F. 3d 662 (9th Cir. 2001)(en banc) by quoting *Enas* 'Congress stated such jurisdiction was inherent, *not delegated by Congress*'. Resp. Brief pg. 10 'The Ninth Circuit found that Duro's historical analysis of a tribe's sovereign power over non-member Indians was one of 'federal common law', which is more akin to statutory interpretation than Constitutional issues, giving Congress the last word on such issues. Id. at 674-675." Resp. Brief at page 10 fn. 10. A direct conflict with *Oliphant*, *Montana* and their 'implicit divestiture' progeny including *Nevada v.*

Hicks, 533 U.S. 353 (2001) Although. "*Oliphant* only determined inherent tribal authority in criminal matters, the principles on which it relied support the general proposition that the inherent sovereign powers of an Indian tribe do not extend to the activities of nonmembers of the tribe." *Montana* at 465. *Enas* applies to civil cases. To remand for a *Montana* jurisdiction definition, instead of relying solely on Congress' jurisdiction definition and Executive interpretations, conflicts with *Enas* and exceeds Article III Court's authority.

Respondents Misread the Importance of the 1968 Indian Civil Rights Act For Tribal Court Jurisdiction

Resp. Brief pg. 13 The *Hicks* decision clearly stated the Conflict Petitioners wish the Court to address, as is even within this Court.

> "Another exaggeration is the concurrence's contention that we "give nonmembers freedom to act with impunity on tribal land based solely on their status as state law enforcement officials," *post*, at 16 (opinion of O'Connor, J.). We do not say state officers cannot be regulated; we say they cannot be regulated in the performance of their law-enforcement duties. Action unrelated to that is potentially subject to tribal control depending on the outcome of *Montana* analysis. Moreover, even where the issue is whether the officer has acted unlawfully in the performance of his duties, the tribe and tribe members are of course able to invoke the authority of the Federal Government and federal courts (or the state government and state courts) to

> vindicate constitutional or other federal- and state-law rights."

Hicks, supra

The Respondents and *Hicks* ignore the Petitioners' *Santa Clara Pueblo v. Martinez*, 436 U.S. 49 (1978) arguments. As Justice Holmes wrote for the Court, a "suit arises under the law that creates the cause of action." *Nat'l Farmers* at 851. **Indian** Civil Rights claims, **Navajo** law violations belong in **Navajo** Court. *Santa Clara Pueblo, supra. Hicks* disregards **Indian** law violations exclusive to Tribal Courts as if they do not exist.

> "Tribal courts have repeatedly been recognized as appropriate forums for the exclusive adjudication of disputes affecting important personal and **property interests of both Indians and non-Indians**. [citations omitted]. Nonjudicial tribal institutions have also been recognized as competent law-applying bodies. See United States v. Mazurie, 419 U.S. 544, 95 S.Ct. 710, 42 L.Ed.2d 706 (1975). Under these circumstances, we are reluctant to disturb the balance between the dual statutory objectives which Congress apparently struck in providing *only* for habeas corpus relief."

Santa Clara at page 51-53.

THE 2000 TECHNICAL ASSISTANCE ACT DOES PROVIDE TRIBAL COURTS WITH CIVIL JURISDICTION OVER NON-INDIANS

Petitioners made a typographical error on pg. 19. The cite should read 25 U.S.C 3651, not 1351. Resp. Brief pg. 15 fn. 11. The year 2000 technical amendments **strengthen** Tribal administration of

Justice. 25 U.S.C. 3651(3), (5). Congress cannot mandate Tribal Courts dispense 'justice', *un*equally, based upon race, national origin, or land ownership where the injury occurred within a federal reservation, as this Court demands. No Article I authority exists for such law, especially by Treaty Law.

THE UNITED STATES RATIFICATION OF THE UNITED NATIONS COVENANT ON CIVIL AND POLITICAL RIGHTS DOES MANDATE TRIBAL COURTS HAVE JURISDICTION OVER NON-INDIANS WITH RESPECT TO CLAIMS ARISING WITHIN

•Resp. Brief. 16 The respondents fail to address the Petitioners' Supreme law of the land Article VI argument. The United Nations International Covenant on Civil and Political Rights Part I Article I, Sec. 3; Part III, Art. 14, Sec. 1" is listed. "All peoples have the right of self-determination...." Id. Part I, Art. I, sec. 3. " All persons shall be equal before the **courts and tribunals**....."Id. Part III, Art. 14, Sec. 1. The Navajo Court is a 'court and tribunal' in the U. S., signatory, for **'all** persons' having **EQUAL** Courts' access, if injured within Navajo country as *Congress and Treaties* defines it in 2000. Undisputably, Article VI Supreme law.

•Resp. Brief fn. 12 claim the Petitioners did not provide a complete copy of the State Department's compliance report they cite on Petition Page 17, nor provide an adequate citation. First, the Report cite is found in footnote 7 *and* footnote 8 and a copy is provided P. L. 143. The *full report* is available by the hyperlink at the bottom of the page at P. L . 143 and fn. 8 Petition page 17.

TRIBAL COURT JURISDICTION OVER NON-INDIANS IS MANDATED BY EXECUTIVE ORDERS

•Resp. Brief pg. 18. Executive Orders 13175, and President Bush's proclamation P. L. 138, support, as the Respondents state, Tribal **self**-government.[5] The Respondents fail to address the Executive Branch defines the Tribal Justice Support Act with contracts. P. L. 55-59, P. S. L. 30 et seq. a study of which is demanded under *Nat'l Farmers*. Navajo law defines its jurisdiction without regard to land ownership, or race or National origin. 7 N. N. Code 254 P. L. 28, 29, 62. The BIA supports this Navajo definition by contract and funding. P. L. 55-59, P. S. L. 30 et seq., and Congress does so by 25 USC 3653 and other statutes. Previously referenced.

RESPONDENTS FAIL TO ADDRESS FULLY THE TERRITORIAL ARGUMENT AND ARTICLE III CONSTITUTIONAL ANALYSIS

The Respondents fail to address the arguments that Indian Tribes qualify as a territory or possession for purposes of 28 USC 1738 full faith and credit and for control by Congressional *plenary* powers, or Article VI trumps state law. Petition pg. 22-24.

RESPONDENTS FAIL TO STATE THE PETITIONER'S QUESTION IS NOT OF NATIONAL IMPORTANCE

Respondents don't rebut petitioner's question is question of national importance of whether the Article III Courts *or* Congress' *plenary* powers, defines Tribal Court authority under an Article III analysis and Constitutional construct. *See*, 25 U.S.C. 3651, 3652, 3653,

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[5] In the year 2000, Congress said ".....(5) tribal justice systems are an **essential** part of tribal governments and serve as important forums for ensuring the health and safety and the political integrity of tribal governments". 25 U.S.C. 3651.

3663. ".....The judicial **shall never exercise the legislative and executive powers**, or either of them: to the end it may be a government of *laws* and not of *men*."..." *Morrison v. Olson*, 487 U.S. 654(1988)(J. Scalia dissent). To determine which powers Tribes enjoy, one must look at "specific restrictions" in treaties or Congressional statutes.[6]

CONCLUSION

Based upon the foregoing, Petitioners' petition should be granted, and the Respondents cross-petitions should be denied.

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[6] United States v. Wheeler, 435 U.S. 313, 323 (1978). "In sum, Indian Tribes still possess those aspects of sovereignty not withdrawn by treaty or statue, or by implication as a necessary result of their dependent status." Id. The Court has rejected attacks on the institutional competency of tribal courts as "contrary to * * * congressional policy," *Iowa Mut. Ins. Co. v. La Plante*, 480 U.S. 9, 19 (1987) and to its own precedents, *Santa Clara Pueblo*, 436 U.S. at 65-66. See also 25 U.S.C. 3601 *et seq.* " [T]hose powers which are lawfully vested in an Indian tribe are not, in general, delegated powers granted by express acts of Congress, but rather inherent powers of a limited sovereignty which has never been extinguished. " 10th Cir. *MacArthur et al v. San Juan County, et al*, below, P. Ap. 11a. "Tribal courts are appropriate forums for *the exclusive* adjudication of disputes over transactions taking place within the boundaries of a reservation." *U.S. v. Plainbull*, 957 F.2d 724, 727 (9th Cir. 1992) (citing *Santa Clara Pueblo v. Martinez*....).

(2) (4)

FILED
JUL 2 2003
OFFICE OF THE CLERK

No. 02-1774; 02-1253

In the

Supreme Court of the United States

FRED RIGGS, DONNA SINGER and AL DICKSON,

Petitioners,

v.

SAN JUAN COUNTY, SAN JUAN HEALTH SERVICES DISTRICT, County Commissioner J. TYRON LEWIS, County Commissioner LYN STEVENS (official capacity only), County Commissioner MANUAL MORGAN (official capacity only), RICK BAILEY, County Attorney CRAIG HALLS, BILL REDD, REID WOOD, KAREN ADAMS, ROGER ATCITTY, PATSY SHUMWAY (official capacity only), JOHN LEWIS, LAUREN SCHAFER, TRUCK INSURANCE EXCHANGE AND DENNIS ICKES; and new district officers, NETTIE PRACK (official capacity only), GLEN IMEL (official capacity only), CLEAL BRADFORD (official capacity only), JOHN FELMETH (official capacity only) and as yet unnamed JOHN AND JANE DOES, in their official and individual capacities, jointly and severally,

Respondents.

Petition for a Writ of Certiorari to the
United States Court of Appeals for the Tenth Circuit

PETITIONERS' SUPPLEMENTAL AUTHORITY BRIEF

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7 pp

SUPPLEMENTAL AUTHORITIES IN SUPPORT OF THE PETITIONERS PETITION FOR A WRIT OF MANDAMUS AND PROHIBITION AND PETITION FOR REHEARING OF PETITION FOR CERTIORARI

Pursuant to Supreme Court Rule 15- 8, the Petitioners file this brief of supplemental authorities. Petitioners have currently before the Court a Petition for a Writ of Mandamus and Petition for a Writ of Prohibition, docket no. 02-1774 and a Petition for Rehearing for their denied Petition for Certiorari docket no. 02-1253. The supplemental authorities below support the Petitioners' view and Harvard University Professor Joseph William Singer's address in the SUPREME COURT'S ATTACK ON INDIAN SOVEREIGNTY in a symposium on Indian law at New England School of law, October, 2002 to be published in an upcoming New England Law Review article. He notes that "Nevada v. Hicks misstates precedent, ignores current congressional and presidential policy, and violates existing treaties." in excerpts of his address found at http://www.indiancountry.com/article/1055857097. See, *U. S. v. Enas*, 2001 U.S. App. LEXIS 14397, *46; 255 F3d 662 (2001) Unanimous En Banc cert denied, 122 S. Ct. 925 (2002) observing lack of Article III Constitutional analysis of Court's authority to diminish Indian Court authority). The subject matter jurisdictional authority of Indian Nation Courts, Federal Courts, Congress, and Executive to define the scope of Indian Nation Court authority is ripe for review and one of national importance. Petitioners assert that accepting these petitions will preserve all parties and Court's resources.

SUPREME COURT LAW

(A) *Nguyen v. United States*, 539 U.S. ____slip opinion, No. 01-10873, Decd' June 9, 2003* upholding Congress'

Article IV authority to make all needful rules and regulations respecting territories or possessions. [1]

(B) *American Ins. Assoc. v. Garmendi*, 539 U.S. ___, slip opinion, docket no. 02-722, Decided June 23, 2003 upholds Article II Executive authority in foreign affairs. "Generally, then, valid executive agreements are fit to preempt state law, just as treaties are,.... Subject, that is, to the Constitution's guarantees of individual rights. ....Id. page 17 fn. 9. Without Congressional *express divestiture* of Navajo Nation authority over non-Indians by statute or treaty, the Executive action here, a BIA-Navajo judicial program contract and funding agreement, should take precedence over Article III Court authority to diminish Indian Nation Court authority. [2] Here Navajo Court authority is over non-Indians seeking voluntarily to involve themselves in Navajo Court processes, which is an essential Indian internal affair, and the dismissal of Truck and Attorney Ickes should be reversed. 25 U.S.C. § 3651 (5) "tribal justice systems are an essential part of tribal

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[1] Here, the Tenth Circuit remanded this case for analysis under *Montana v. U. S.*, 450 U.S. 545(1981) and progeny, *where Courts diminish* Indian Nation authority. Conflicting, since 1981, *Congress* using plenary power upheld equal Indian Nation authority over all, by the Tribal Justice Support Act, 25 U.S.C. §§1301-1306 [1993] and the 2000 Technical Amendments 25 U.S.C. §§3631-3663, both identifying Tribal Courts as the *'most'* appropriate forums for disputes in Indian Country over *Indian and non-Indian alike.* S. Rep. No. 88 103d Cong, 1st Sess.8 (1993) H.R. Conf. Rep. No. 383, 103d Cong. 1st sess. 13 (1993).

[2] "Those powers which are lawfully vested in an Indian tribe are not, in general, delegated powers granted by express acts of Congress, but rather inherent powers of a limited sovereignty which has never been extinguished." Felix S. Cohen, Handbook of Federal Indian Law 122 (1941);" *MacArthur v. San Juan County*, 2002 U.S. App. LEXIS 20987 *14 appealed decision below

governments and serve as important forums for ensuring the health and safety and the political integrity of tribal governments". If orders are not enforceable, they can not ensure health and safety.

(C) *Nevada Dept. of Human Resources v. Hibbs*, 538 U.S. ____slip opinion, docket no. 01-1368, decided May 27, 2003, finding "In enacting the FMLA, Congress relied on two of the powers vested in it by the Constitution: its Article I commerce power and its power under §5 of the Fourteenth Amendment to enforce that Amendment's guarantees." Here, Congress in enacting the Indian Civil Rights Act and Self-Determination Act, Congress was expanding the 14th amendment guarantees to 'any person' within Indian Nation borders, consistent with Congress' Constitutional limitations "that is essentially a direction that all persons similarly situated should be treated alike." **[(D)]** See, *Lawrence v. Texas*, 539 U.S. _____, slip opinion, docket no. 02-102, dec'd **June 26, 2003** pg. (J. O'Connor, pg. 1 concurrence). Here, the Navajo Court by statute is MANDATED to treat all equally, by statute and contract, and yet, case law since 1978's *Oliphant v. Squamish Indian Tribe*, 1978 U.S. LEXIS 66, *26, 435 U.S. 191, will presume against equality under Indian law. There is no way the Navajo Court can be correct, by statute ***or*** by Court ruling, ***unless*** *this Court does a Constitutional analysis of its and Congress' and Executives' authority over Indian Treaty Nation jurisdictional authority.* . a daunting, insurmountable National conflict!

The Circuit Courts Have Split

8th Cir. *U. S. v. Lara* 2003 U.S. App. LEXIS 5685,*;324 F.3d 635 March 24, 2003 and **7th Cir.** *U. S. v. Long*, 2003 U.S. App. LEXIS 5492,*;324 F.3d 475 **split directly on the same questions asked by these petitioners**.... what is the root authority of Indian Nation Courts,

inherent sovereignty or Congressional delegation, and thus, the subject matter jurisdictional authority of Article I Congress, Article II Executive, and Article III Courts to define Indian Nation Jurisdictional authority, that this Court has found in *Oliphant* and *Nevada v. Hicks*, *supra*, extends to the criminal and civil context alike. *This 10th cir. case should be taken with these 7th and 8th circuit cases to prevent years of wasted judicial resources, appeals and de facto Congressional Indian Law nullification. Lara* is U. S. Supreme Court docket no. 02-1059 and *Long* is docket no. 02-1646. *Lara*'s petition is due July 22, 2003 and the Department of Justice is anticipated to support the position of the Petitioners that Congress defines Indian Court authority. **10th Cir.** *Seneca-Cayuga Tribe of Oklahoma et al v. National Indian Gaming Commission et al* 2003 U.S. App. LEXIS 7284,*;327 F.3d 1019, 10th Cir., April 17, 2003.[3] Upholds several Petitioner arguments. **10th Cir.** *Kennedy v. Hughes*, 60 Fed. Appx. 734; 2003 U.S. App. LEXIS 5475 *12, (unpublished) decided March 20, 2003 upholds Indian Nation forums as exclusive Courts for vindication of Indian Civil Rights Act violations found here. **8th Cir.** – *Penn v. U.S.*, 2003 U.S. App. LEXIS 6357,*9-10;324 F.3d 992, April 3, 2003, upholds Indian Court authority over nonmembers and facially valid order to give Indian Court judge immunity. **4th Cir.** – *Int'l Bancorp, LLC et al v. Societe Des Bains de Mer Et Du Cercle Des Etrangers a Monaco* 2003 U.S. App. LEXIS 9566,*10;329 F.3d 359; decided May 19,

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[3] defines 'Indian Country' the same way as the Navajo Nation and 18 U.S.C. §1151 [at fn.1]; as long as there is "legally cognizable interest in the outcome" the case is not moot [*22] noting actions of a party to try to make it moot sealing the orders from post trial review [*25]; upholds Congressional intent of its statutes [*39]; *Cheveron* deference should be given the Executive's carrying out a statutory scheme [*48-49][here a BIA-judicial program funding agreement demanding uniform and fair use of Navajo law].

2003 upholds the full broad scope of Article I §8 cl. 3 (the Congress shall have Power . . . to regulate Commerce with ..... Indian Tribes") still undiminished here.

28 U.S.C. 1738 Full Faith and Credit will Eliminate the Following Conflicts Between the Court and Congress and Executive Policies

This Court can *support* Tribal Authority over all equally; *support* Treaty Inherent Sovereignty not expressly divested by Congress; *support* congressionally -, BIA-Approved Indian Court orders; *support* Indian Civil Rights Act protections; *support* Indian Nation political integrity and safety; OR- eliminate all the above, dismiss non-Indian parties, and ignore Off reservation facially valid orders.

Full faith and credit for Indian rulings resolves all these conflicts. It is easy to see that unless these petitions are taken, no matter how the Federal court rules, it will be appealed, and resources of the Courts and the parties will be wasted for a question that is ripe now.

CONCLUSION

Based upon the foregoing supplemental authorities, the Petitions, docket no. 02-1253 and 02-1774 should be accepted by the Court and briefed by the parties.

Respectfully submitted,

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